Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

ALFRED M. COHEN,
EXECUTOR OF THE ESTATE OF SAMUEL GINSBURG,
Petitioner,

v.

PAINEWEBBER, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Sixth Circuit Court of Appeals applies an abuse of discretion standard for a district court's determination whether a party is necessary under Rule 19(a) and a de novo review for a district court's determination whether a party is indispensable under Rule 19(b) of the United States Federal Rules of Civil Procedure. United States Courts of Appeal in the Fourth, Ninth, and Tenth circuits apply an abuse of discretion standard when applying Rule 19(a) and (b). The First, Second, Fifth, Eighth, Eleventh, and District of Columbia circuit courts of appeal have not decided on a standard of review when a district court applies Rule19(a). These circuits apply an abuse of discretion standard to a district court's determination under 19(b). The Third Circuit applies a de novo review when reviewing a district court's 19(a) determination and an abuse of discretion review when reviewing a district court's 19(b) determination. The Seventh Circuit has chosen not to adopt a standard of review.

The question presented for review is:

What is the standard of review of a trial court's ruling on whether a party is necessary and indispensable under Rule 19 of the Federal Rules of Civil Procedure?

PARTIES TO THE PROCEEDINGS

Alfred Cohen, Executor of the Estate of Samuel Ginsburg, is the only petitioner in this proceeding. PaineWebber Incorporated and Richard E. Wilhelm are the only respondents in this proceeding.

STATEMENT OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Supreme Court Rule 29, Petitioner makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

   No

2. Is there a publicly owned corporation, not party to this appeal that has a financial interest in the outcome?

   No

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OPINION BELOW

The Sixth Circuit published one opinion resolving the case below. The published opinion is reported at 276 F.3d 197. The judgment of the district court is unreported.

STATEMENT OF THE BASIS FOR JURISDICTION

The Sixth Circuit entered its judgment on December 27, 2001. Petitioner filed a timely petition for enbanc panel rehearing on January 6, 2002, which was denied on February 18, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULE OF CIVIL PROCEDURE AT ISSUE

Rule 19. Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the

joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as prescribed in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

STATEMENT OF THE CASE

On August 11, 1992, Samuel Ginsburg ("Ginsburg") entered into an agreement with PaineWebber Inc. ("PaineWebber") for assistance in business planning, including the purchase and sale of stock. From 1992 through 1999, a registered securities broker, Richard Zenni,

("Zenni") worked for PaineWebber under the supervision and control of Richard E. Wilhelm. ("Wilhelm") Wilhelm was the branch manager of PaineWebber's Cincinnati office. Zenni stole several million dollars from elderly investors, including Samuel Ginsburg. The brokerage contract between Ginsburg and PaineWebber included an arbitration agreement.

On July 26, 2000, Alfred M. Cohen ("Petitioner") filed a complaint on behalf of the estate of Samuel Ginsburg against PaineWebber and Richard Wilhelm in the Hamilton County Ohio Court of Common Pleas. The complaint alleged that PaineWebber and Wilhelm ("Respondents") assisted Richard Zenni in stealing several million dollars from elderly investors, which included Samuel Ginsburg. The complaint did not state a federal cause of action.

The Petitioner is a resident of Hamilton County, Ohio and the executor of the estate of Samuel Ginsburg. PaineWebber is a Delaware corporation and engaged in the business of investment planning, including the purchase and sale of stock. Richard Wilhelm is a resident of Hamilton County, Ohio and, at all relevant times, supervised all employees and accounts in PaineWebber's Cincinnati, Ohio branch office.

A. Proceedings in the District Court

On July 28, 2000, PaineWebber ("Respondent") filed a petition in the Southern District Court of Ohio to compel the Petitioner to arbitrate claims under Section 4 of the Federal Arbitration Act. On August 4, 2000, the Petitioner responded by moving to dismiss the petition for lack of subject matter jurisdiction under Rule 19 of the Federal Rules of Civil Procedure. The motion to dismiss asserted that Wilhelm, a resident of the state of Ohio, was a necessary and

indispensable party under Rule 19 of the Federal Rules of Civil Procedure. The addition of Wilhelm would eliminate diversity jurisdiction and require dismissal of the petition. On December 21, 2000, the District Court heard oral arguments.

On January 31, 2001, the District Court issued its decision and determined that Wilhelm was a necessary and indispensable party. The District Court dismissed the petition for lack of subject matter jurisdiction.

In its decision, the District Court focused on the likelihood of inconsistent legal obligations under Rule 19(a) and the high potential for prejudice against both parties. The District Court held

> [P]ermitting this suit to continue in both the state and federal courts would likely subject parties to inconsistent legal obligations in a manner prohibited by Rule 19(a)(2)(ii). Both courts would be asked to make determinations on the validity, interpretation and application of the arbitration agreements. The high potential for whipsawing indicates a likelihood that the parties would be prejudiced. The arbitration clauses of the agreements state that an award may be entered "in any court of competent jurisdiction." The state court can give arbitration agreements full effect and the state court has jurisdiction over all the parties.

Order and Opinion at 13. The Respondents filed a notice of appeal on March 1st, 2001 to the Sixth Circuit Court of Appeals.

B. Proceedings in the Sixth Circuit Court of Appeals

The Sixth Circuit Court of Appeals heard arguments on October 25, 2001. On December 27, 2001, the reviewing panel reversed the district court's determination that Richard Wilhelm is a necessary and indispensable party.

In its decision, the panel applied an abuse of discretion standard in affirming the district court's Rule 19(a) analysis. The panel, however, conducted a de novo review to hold that Wilhelm was not an indispensable party under Rule 19(b). The panel concluded that Wilhelm's absence causes the Petitioner minimal prejudice. The panel determined, "[A]lthough, we acknowledge the seriousness of Cohen's concerns, his characterization of the risks fails to take into account several important factors. These considerations indicate that the potential prejudice to Cohen or Wilhelm if this action proceeds without Wilhelm is minimal." Order and Opinion at 8.

One judge dissented because the majority minimized the prejudice that the estate will suffer if the estate is forced to litigate the matter in state court against Wilhelm and in federal court against PaineWebber. Dissent at 20. The dissent also noted that the majority inappropriately discounted the prejudice that Wilhelm faced if he is forced to defend himself in state court without the support of PaineWebber. *Id.*

REASONS FOR GRANTING THE PETITION

This petition is filed pursuant to Supreme Court Rule 10. The Sixth Circuit Court of Appeals has entered a judgment based on a standard of review that conflicts with the standard of review used by other circuit courts. The Sixth Circuit applies a de novo review in determining whether a

party is indispensable under 19(b). A majority of circuits, however, apply an abuse of discretion review.

The importance of this case centers on the confusion that exists in the circuit courts regarding the standard of review the courts of appeal should apply in determining whether a party is necessary and indispensable under Rule 19. This Court, in the past, has found that issues involving appropriate standards of review raise important issues meriting the granting of a petition for a writ of certiorari. *See Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678 (2001); *General Electric Company v. Joiner*, 522 U.S. 136, 118 S.Ct. 512 (1997); *Hernandez v. New York*, 498 U.S. 894, 111 S.Ct. 242 (1990); *Firestone Tire and Rubber Company v. Bruch*, 489 U.S. 101, 109 S.Ct. 948 (1989).

This Court, as well as other circuit courts of appeal, has determined abuse of discretion is the appropriate standard of review because a district court must make a factual determination whether a party is indispensable. *See Provident Trademens Bank & Trust Co., v. Patterson*, 390 U.S. 102, 119, 88 S.Ct. 733, 742 (1968); *National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Rite Aid of South Carolina, Incorporated*, 210 F.3d 246, n.7 (4th Cir. 2000); *Washington v. Daley*, 173 F.3d 1158, 1165 (9th Cir. 1999); *Davis v. United States*, 192 F.3d 951, 957 (10th Cir. 1999). The factual determination by the district court precludes a de novo review, which is based on legal considerations.

I. The standard of review used by the Sixth Circuit is in conflict with the standard of review used by several circuit courts when determining whether a party is necessary and indispensable.

A conflict among the circuits exists regarding the appropriate standard of review to apply when considering whether a party is necessary and indispensable. *See Thomas v. United States*, 189 F.3d 662, 666 (7th Cir. 1999); *Keweenaw Bay Indian Community v. Michigan*, 11 F.3d 1341, 1346 (6th Cir. 1993); *National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Rite Aid of South Carolina, Inc.*, 210 F.3d 246, n.7 (4th Cir. 2000). *See* Table of Standard of Review by Circuit Appendix pg. 31. The Sixth Circuit panel used a de novo standard to determine whether the lower court properly decided whether Wilhelm was an indispensable party. *See* Op. at 4. The panel, when determining the standard of review, relied on *Keweenaw Bay Indian Community v. Michigan*, 11 F.3d 1341, 1346 (6th Cir. 1993). Order and Opinion at 4.

In *Keweenaw*, the Sixth Circuit decided to apply two standards when reviewing a district court's Rule 19 analysis. The Sixth Circuit determined "[W]hereas we made clear that the distinct indispensability analysis under Rule 19(b) is inherently a legal question, the preliminary determination as to whether a party is necessary to the action, under Rule 19(a), is based solely on a district court's factual finding." *Id* at 1346.

The Fourth, Ninth, and Tenth Circuits apply an abuse of discretion standard under Rule 19(a) and 19(b). *National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Rite Aid of South Carolina, Inc.*, 210 F.3d 246, n.7 (4th Cir. 2000); *Washington v. Daley*, 173 F.3d 1158, 1165 (9th

Cir. 1999); *Davis v. U.S.*, 192 F.3d 951, 957 (10th Cir. 1999). However, the Ninth and Tenth Circuits deviate from the Fourth Circuit by requiring a de novo review of the district court's legal determinations. *Id.*

The Seventh Circuit has declined to determine a standard of review. The Seventh Circuit has failed to adopt a standard by citing to the diversity of decisions among the circuits. *Thomas v. United States*, 189 F.3d 662, 666 (7th Cir. 1999). The lack of a uniform standard, therefore, causes the Seventh Circuit to apply a standard of review on a case-by-case basis. Indeed, the Seventh Circuit chooses the standard of review for a particular case as it deems it necessary. *Id.*

The Third Circuit applies a standard totally opposite to the standard used by the Sixth Circuit Court of Appeals. The Third Circuit applies a de novo review standard under 19(a) and an abuse of discretion standard under 19(b). *Koopers Company, Incorporated v. The Aetna Casulty and Surety Company*, 158 F.3d 170, 174 (3rd Cir. 1998). The Third Circuit, therefore, stands by itself when reviewing a district court's Rule 19 decision. However, past Third Circuit decisions have allowed for a panel to choose whichever standards of review it prefers. *Janney Montgomery Scott, Incorporated v. Shepard Niles, Incorporated*, 11 F.3d 399, 404 (3rd Cir. 1993).

The First, Second, Fifth, Eighth, Eleventh, and District of Columbia circuits apply a different standard than the circuit courts indicated above. In reviewing a Rule 19(a) determination, the First, Second, Fifth, Eighth, Eleventh, and District of Columbia circuits are undecided regarding a standard of review. Each of these circuit courts, on the other hand, applies an abuse of discretion standard when

determining whether a party is indispensable under Rule 19(b). *See Tell v. Trustees of Dartmouth College*, 145 F.3d 417, 418-419 (1st Cir. 1998); *Jota v. Texaco, Inc.*, 157 F.3d 153, 161 (2nd Cir. 1998); *Pulitzer-Polster v. Pulitzer*, 784 F.2d 1305, 1309 (5th Cir. 1986); *United States ex re. Steele v. Turn Key Gaming, Inc.*, 135 F.3d 1249, 1251 (8th Cir. 1998); *In Re Torcise*, 116 F.3d 860, 865 (11th Cir. 1997); *Kickapoo Tribe of Indians v. Babitt*, 43 F.3d 1491, 1495 (D.C. Cir. 1995).

Due to the conflict among the circuit courts this Court should establish a uniform standard of review for circuit courts to apply when determining whether a party is necessary and indispensable under Rule 19. The lack of guidance from this Court results in the circuit courts arbitrarily deciding the type of review to apply. *See Koopers Company, Incorporated v. The Aetna Casulty and Surety Company*, 158 F.3d 170, 174 (3rd Cir. 1998); *Thomas v. U. S.*, 189 F.3d 662, 666 (7th Cir. 1999). These variations impact on the power of the district court and the faith of the public in the judicial system. A de novo review of a Rule 19 determination directly limits the abilities of a district court to determine whether it has jurisdiction based on its perception of the factual record. *See Umlic-Nine v. Lipan Springs Dev. Corp.*, 168 F.3d 1173, 1176 (10th Cir. 1999); *Keweenaw Bay Indian Community v. Michigan*, 11 F.3d 1341, 1346 (6th Cir. 1993); *Koopers Company, Inc. v. The Aetna Casulty and Surety Company*, 158 F.3d 170, 174 (3rd Cir. 1998). An abuse of discretion standard is more balanced because it is based on the district court's factual determination. *National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Rite Aid of South Carolina, Inc.*, 210 F.3d 246, n.7 (4th Cir. 2000).

Without guidance from this Court, the public and the legal system is subjected to unnecessary confusion concerning

a fundamental issue. Chief Justice Major Harding of the Florida Supreme Court has stated, "After determining jurisdiction, the next most important issue to be resolved in an appellate matter is the standard of review. Making this determination at the outset helps in guiding attorneys and judges in the appropriate resolution of the case." *See The Florida Bar Journal* at 33, February (1996); *See also* 77 *U. Det. Mercy L. Rev.* 603, 606-607. Absent this Court's review, a party bringing an appeal or a district judge making a Rule 19 determination will remain unsure regarding the correct standard of review an appellate court may apply.

II. This Court should adopt an abuse of discretion standard of review for determining whether a party is necessary under 19(a).

The Fourth, Sixth, Ninth, and Tenth Circuits appropriately apply an abuse of discretion standard when determining if a party is necessary under Rule 19(a). *National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Rite Aid of South Carolina, Inc.*, 210 F.3d 246, n.7 (4th Cir. 2000); *Keweenaw Bay Indian Community v. Michigan*, 11 F.3d 1341, 1346 (6th Cir. 1993); *Washington v. Daley*, 173 F.3d 1158, 1165 (9th Cir. 1999); *Davis v. U. S.*, 192 F.3d 951, 957 (10th Cir. 1999). This standard is correct because the two factors outlined under Rule 19(a) require fact-finding.

The first factor of Rule 19(a) provides that in the person's absence complete relief cannot be accorded among the parties. The only means to determine if complete relief can be granted is by examining the facts of the case to determine the type and amount of liability of a particular party.

The second factor of Rule19(a) includes two subparts. The first subpart requires an investigation into the ability of a person to protect his interests in the absence of the necessary party. Typically, courts examine the facts of the case to determine if a person's interests will be harmed in the absence of a party. *See National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Rite Aid of South Carolina, Inc.*, 210 F.3d 246, 250-251 (4th Cir. 2000); *Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir. 1999); *Davis v. U. S.*, 192 F.3d 951, 958 (10th Cir. 1999). The second subpart of Rule 19(a), is if the absence of a necessary party would leave the parties with a risk of incurring multiple legal obligations. This is also a factual determination. A court must examine what other obligations a party would incur in other courts or other jurisdictions.

III. This Court should adopt an abuse of discretion standard of review to determine whether a party is indispensable under 19(b).

This Court has already determined that a Rule 19(b) inquiry is fact specific. *Provident Trademens Bank & Trust Co., v. Patterson*, 390 U.S. 102, 119, 88 S.Ct. 733, 742 (1968). In *Provident*, this Court held "[T]he decision whether to dismiss (i.e., the decision whether the person missing is 'indispensable') must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests." *Id* at 119. Therefore, a decision whether a party is indispensable under Rule 19(b) is a factual determination.

By its very nature, the determination of whether a party is indispensable involves a factual analysis. The circuits

that apply an abuse of discretion standard understand that Rule 19 requires a trial court to review the facts.

> We favor the position of the District of Columbia and Ninth Circuits. Rule 19(b) determinations must be based on fact-specific considerations. See Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 119, 88 S.Ct. 733, 743, 19 L.Ed.2d 936 (1968). These determinations are anything but pure legal conclusions. They are not based on "the technical or abstract character of the rights or obligations of the persons whose joinder [is] in question." Advisory Committee Notes on the 1966 Amendments to Rule 19. Instead, they involve the balancing of competing interests and must be steeped in "pragmatic considerations." *Id.* The district court, which is "closer to the arena," is in the preferred position to make these decisions. See Broussard v. Columbia Gulf Transmission Co., 398 F.2d 885, 889 (5th Cir.1968). We hold that its Rule 19(b) conclusions are entitled to deference, and will not be reversed unless they amount to an abuse of discretion.

The Travelers Indemnity Company v. Dingwell, 884 F.3d 629, 635 (1st Cir. 1989).

Indeed, the four factors outlined in Federal Rule of Civil Procedure 19(b) require fact-finding. The first factor requires the district court to determine the prejudice to the parties. The only means that a district court has to assess prejudice is to review the facts surrounding each of the parties. The second factor requires the district court to

determine if the prejudice can be lessened. Again, this requires the district court to assess the unique circumstances of each of the parties. The third factor requires an assessment concerning whether a judgment rendered in a party's absence would be adequate. The district court only can obtain this finding by analyzing the relationship of the parties. The district court only can determine this relationship by examining the facts. The fourth factor involves the availability of an adequate remedy if the district court dismisses the case. This finding obviously involves a factual determination of the available remedies. *See* Order and Opinion at 13 (panel decision finding that state court provides an alternative forum).

The Advisory Committee Notes to Rule 19(b) further establish that a district court is entitled to use its discretion when deciding whether a party is indispensable. According the Committee Notes, the district court should make its determination in "equity and good conscience" and "in light of pragmatic considerations". Fed. R. Civ. P. 19. Rule 19 advisory committee's note. The Advisory Committee Notes, therefore, implicitly if not explicitly requires Courts of Appeals to review an indispensable party determination by using the abuse of discretion standard.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 01-3228

[Filed February 18, 2002]

PAINEWEBBER, INC., Plaintiff-Appellant,	)
v.	)
ALFRED M. COHEN, EXECUTOR OF THE ESTATE OF SAMUEL GINSBURG, Defendant-Appellee	)

BEFORE:
BOGGS, GILMAN, and BRIGHT*
Circuit Judges

* Hon. Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Bright would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 01-3228

[Filed December 27, 2001]

PAINEWEBBER, INC.,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
ALFRED M. COHEN,	)
EXECUTOR OF THE ESTATE	)
OF SAMUEL GINSBURG,	)
Defendant-Appellee	)
	)

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
AT CINCINNATI
No. 00-00611
Herman J. Weber, District Judge.

JUDGES:

Before: BOGGS, GILMAN, and BRIGHT, Circuit Judges.*

OPINION

RONALD LEE GILMAN, Circuit Judge. PaineWebber, Inc. filed a petition to compel arbitration and stay the state court action brought by Alfred Cohen, as executor of the Estate of Samuel J. Ginsburg, against PaineWebber and Richard Wilhelm, one of PaineWebber's branch managers. Following the district court's determination that Wilhelm, an Ohio resident whose presence would defeat complete diversity of citizenship, was a necessary and indispensable party to the federal proceeding, the court dismissed PaineWebber's petition for lack of subject matter jurisdiction. For the reasons set forth below, we REVERSE the judgment of the district court and REMAND the case for further proceedings consistent with this opinion.

I. BACKGROUND

A. Factual background

Ginsburg entered into a "Client's Agreement" with PaineWebber on August 11, 1992. This agreement contains a detailed arbitration clause providing "that any and all controversies . . . concerning any account, transaction,

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* The Honorable Myron H. Bright, Senior Circuit Judge for the United States Court of Appeals for the Eighth Circuit, sitting by designation.

dispute or the construction, performance, or breach of this or any other agreement . . . shall be determined by arbitration." Several days later, Ginsburg and PaineWebber executed a "Master Account Agreement" that contains an arbitration clause nearly identical to the one found in the Client's Agreement. One significant difference between the two documents, however, is that the Master Account Agreement's arbitration clause not only references disagreements between PaineWebber and Ginsburg, but also specifies that it governs disputes between Ginsburg and "[PaineWebber's] employees or agents." Both agreements include provisions that make their terms binding on Ginsburg's heirs, executors, administrators, successors, and assigns.

After Ginsburg died on October 9, 1999, Cohen, an Ohio resident, was appointed the executor of Ginsburg's estate. Acting in his capacity as executor, Cohen filed a lawsuit against PaineWebber and Wilhelm in the Hamilton County Court of Common Pleas on July 26, 2000, asserting claims of conversion and fraudulent concealment that relate to Ginsburg's brokerage account with PaineWebber.

B. Procedural background

PaineWebber filed a petition in the United States District Court for the Southern District of Ohio two days later, seeking to compel arbitration, enforce the arbitration agreements, and stay Cohen's state court action. It filed an amended petition seeking the same relief on August 10, 2000. Wilhelm was not named as a party in either PaineWebber's original or amended petition. The sole basis for federal jurisdiction over PaineWebber's petition was diversity of citizenship under 28 U.S.C. § 1332.

PaineWebber also filed a motion in state court to stay the action there pending a ruling by the district court on PaineWebber's petition. The state court did not rule on this motion because the parties submitted an agreement not to proceed with the state court action while the federal petition was pending. Aside from the state court's issuance of a temporary restraining order to preserve evidence, no further proceedings occurred in the state court until after the district court ruled on PaineWebber's petition.

On January 31, 2001, the district court granted Cohen's motion to dismiss PaineWebber's petition for lack of subject matter jurisdiction. The district court determined, pursuant to Rule 19 of the Federal Rules of Civil Procedure, that Wilhelm was a necessary and indispensable party to PaineWebber's petition to compel arbitration. Because Ginsburg was and Wilhelm is a resident of Ohio, and Cohen is deemed to be a citizen of the same state as Ginsburg pursuant to 28 U.S.C. § 1332(c), Wilhelm's presence would defeat complete diversity of citizenship. The district court therefore dismissed the petition.

II. ANALYSIS

A. Standards of review

A district court's finding that a party is necessary to an action, so that the party should be joined pursuant to Rule 19(a) of the Federal Rules of Civil Procedure if feasible, will not be set aside unless we find an abuse of discretion. *Keweenaw Bay Indian Cmty. v. Michigan,* 11 F.3d 1341, 1346 (6th Cir. 1993). In contrast, a district court's application of Rule 19(b)'s factors to determine whether a necessary party

is also indispensable to an action is a legal conclusion to be reviewed de novo. *Id.* Similarly, we review a district court's decision regarding the existence of subject matter jurisdiction de novo. *Caudill v. N. Am. Media Corp.*, 200 F.3d 914, 916 (6th Cir. 2000).

B. Rule 19 and subject matter jurisdiction

Rule 19 of the Federal Rules of Civil Procedure establishes a three-step analysis for determining whether a case should proceed in the absence of a particular party. *Keweenaw Bay Indian Cmty.*, 11 F.3d at 1345. A court must first determine "whether a person is necessary to the action and should be joined if possible." *Soberay Mach. & Equip. Co. v. MRF Ltd., Inc.*, 181 F.3d 759, 763-64 (6th Cir. 1999); Fed. R. Civ. P. 19(a). If the party is deemed necessary for the reasons enumerated in Rule 19(a), the court must next consider whether the party is subject to personal jurisdiction and can be joined without eliminating the basis for subject matter jurisdiction. *Keweenaw Bay Indian Cmty.*, 11 F.3d at 1345-46 (describing the second step of the Rule 19 analysis as an inquiry into whether the court has personal jurisdiction over the necessary party); Fed. R. Civ. P. 19(a) (requiring the court to join a necessary party "who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action").

The third step "involves an analysis under Rule 19(b) to 'determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent party [being] thus regarded as indispensable.'" *Soberay Mach. & Equip. Co.*, 181 F.3d at 764 (quoting Fed. R. Civ. P. 19(b)). Dismissal should occur

only if an indispensable party is not subject to personal jurisdiction or cannot be joined without eliminating the basis for subject matter jurisdiction. *Id.* at 770 (concluding that the district court erred in failing to consider the defendant's motion to dismiss the case under Rule 19, because joining the indispensable party would have eliminated complete diversity). If a necessary party is not deemed indispensable pursuant to Rule 19(b), that potential party need not be joined and the action can proceed with the original litigants.

1. Whether Wilhelm is a necessary party to the federal proceeding between PaineWebber and Cohen

The district court based its determination that Wilhelm is a necessary party to the federal proceeding between PaineWebber and Cohen on its finding that Ginsburg's contracts with PaineWebber apply not only to PaineWebber, but also to its employees. In performing its analysis, the district court focused on Rule 19(a)(2)(ii), which provides that a party is necessary if

> the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may . . . leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.
>
> Because the contracts cover both PaineWebber and Wilhelm, the court concluded that

> Wilhelm is necessary to any proceeding interpreting the arbitration clause in the contracts. The district court believed that this result avoided the possibility of a federal court and a state court reaching opposite conclusions regarding the question of whether the contracts require Cohen to process his claims through arbitration.

Applying an abuse-of-discretion standard, we must affirm the district court's Rule 19(a) analysis unless we are "left with a definite and firm conviction that the trial court committed a clear error of judgment." *Cincinnati Ins. Co. v. Byers*, 151 F.3d 574, 578 (6th Cir. 1998) (internal quotation marks and citation omitted). The language of the contract between Ginsburg and PaineWebber permits a finding that the contract also covers PaineWebber's employees, which would include Wilhelm. Although the contract's terms seem designed primarily to protect the interests of Ginsburg and PaineWebber, they arguably benefit employees like Wilhelm by enabling them to arbitrate complaints that PaineWebber's customers might have against them.

Wilhelm could therefore claim an interest in the contract between Ginsburg and PaineWebber. If a federal court and a state court reached different conclusions regarding whether the arbitration clauses apply to Cohen's claims against PaineWebber and Wilhelm, Cohen would be faced with inconsistent procedural remedies against the alleged joint tortfeasors. We thus conclude that the district court did not abuse its discretion in determining that Wilhelm is a necessary party to this action.

2. Whether Wilhelm's presence would deprive the court of subject matter jurisdiction

The sole basis for subject matter jurisdiction in this action is diversity of citizenship under 28 U.S.C. § 1332. Section 1332 confers federal jurisdiction only if complete diversity of citizenship exists, such that no party has the same citizenship as any opposing party. *Caudill v. N. Am. Media Corp.*, 200 F.3d 914, 916 (6th Cir. 2000). Ginsburg was and Wilhelm is a citizen of Ohio. Cohen is deemed to be a citizen of the same state as Ginsburg for purposes of diversity jurisdiction. 28 U.S.C. § 1332(c)(2) (providing that for purposes of § 1332, "the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent"). Wilhelm's presence in this action would therefore eliminate complete diversity of citizenship. As a result, the district court correctly concluded that joining Wilhelm would deprive the court of subject matter jurisdiction.

3. Whether Wilhelm is an indispensable party to the federal proceeding between PaineWebber and Cohen

Rule 19(b) lists four factors that a court must consider in determining whether a necessary party is also indispensable. First, the court must decide the extent to which "a judgment rendered in the person's absence might be prejudicial to the person or those already parties" to the action. Fed. R. Civ. P. 19(b). The second factor requires the court to determine whether and to what extent it might be able to reduce or avoid the prejudice "by protective provisions in the judgment, by the shaping of relief, or other measures." *Id.*

Rule 19(b)'s third consideration is "whether a judgment rendered in the person's absence will be adequate." *Id.* Finally, the court must assess "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." *Id.*

With regard to the potential prejudice to Wilhelm or Cohen if this action proceeds without Wilhelm, Cohen focuses on the potentially inconsistent legal obligations that might result from conflicting interpretations of the arbitration clauses by state and federal courts. Cohen also opposes the possibility of being involved with proceedings in both federal and state court because of the duplicate efforts and the risk of conflicting and inconsistent schedules, arbitration awards, discovery processes, and legal doctrines. Although we acknowledge the seriousness of Cohen's concerns, his characterization of the risks fails to take into account several important factors. These considerations indicate that the potential prejudice to Cohen or Wilhelm if this action proceeds without Wilhelm is minimal.

As an initial matter, the possibility of having to proceed simultaneously in both state and federal court is a direct result of Cohen's decision to file a suit naming PaineWebber and Wilhelm in state court rather than to demand arbitration under the Master Account Agreement. Cohen's status as the state court plaintiff and Wilhelm's position as a defendant in the state court action are of crucial significance in this regard. Compare *Bio-Analytical Servs., Inc. v. Edgewater Hosp., Inc.*, 565 F.2d 450, 453 & n.3 (7th Cir. 1977) (holding that the absent party was not indispensable, and noting that no named party faced a significant risk of additional litigation brought by the absent

party because the absent party was a defendant rather than a plaintiff in the pending state court action) with *Ranger Fuel Corp. v. Youghiogheny & Ohio Coal Co.*, 677 F.2d 378, 380-81 (4th Cir. 1982) (holding that an absent party whose presence would destroy complete diversity was indispensable where the plaintiff filed a petition to compel arbitration in federal court after two parties, only one of which was named in the federal court petition, had initiated a state court action against the federal court plaintiff).

Bio-Analytical Services, like the present case, presented a situation where the plaintiff, Bio-Analytical Services, sought an order from the federal court to compel arbitration of claims that the defendant, Edgewater Hospital, brought against it and a non-diverse party, Dr. Mark, in state court. *Bio-Analytical Servs., Inc.*, 565 F.2d at 451-52. In determining that the absence of Dr. Mark would not be prejudicial to either the parties or Dr. Mark, the court explained that Edgewater's concern with repetitious lawsuits was solely the result of its state court lawsuit. 565 F.3d at 453 & n.3. The same conclusion applies to Cohen's argument that proceeding without Wilhelm might force him to be a party to two proceedings rather than only one. Furthermore, although Dr. Mark was potentially liable to Edgewater, Edgewater was not subject to any liability to Dr. Mark. 565 F.3d at 453. Cohen similarly faces no possible liability to Wilhelm, even though Wilhelm might be liable to Cohen.

Even if the parallel proceedings were not the result of Cohen's pending state court action, the possibility of piecemeal litigation is a necessary and inevitable consequence of the FAA's policy that strongly favors arbitration. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*, 460 U.S. 1, 20,

74 L. Ed. 2d 765, 103 S. Ct. 927 (1983) (noting that the possibility of the plaintiff having to resolve its disputes in two forums--one in state court and one in arbitration--where one of the parties to the underlying dispute was not a party to the arbitration agreement, "occurs because the relevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement") (emphasis in original); *Doctor's Assocs., Inc. v. Distajo,* 66 F.3d 438, 446 (2d Cir. 1995) (concluding that the FAA's "strong bias in favor of arbitration" overcomes any possible prejudice due to piecemeal litigation caused by the absence of certain parties to the arbitration agreement).

The fact that the arbitration clauses in Ginsburg's contracts with PaineWebber also apply to Wilhelm does not alter our analysis. *See Snap-On Tools Corp. v. Mason,* 18 F.3d 1261, 1265-67 (5th Cir. 1994) (rejecting the defendants' contention that the plaintiff's employees were indispensable parties to the petition to compel arbitration of the defendants' state law claims against the plaintiff where the employees, who were named as parties in the defendants' state court lawsuit, might be covered by an arbitration agreement between the defendant and the plaintiff).

Equally important, Cohen's fear that the federal and state courts will reach conflicting interpretations of the arbitration clauses does not present the degree of prejudice necessary to support a conclusion that Wilhelm is an indispensable party. *Bio-Analytical Servs., Inc.,* 565 F.2d at 453 & n.3 (refusing to consider the absent party indispensable where "the only danger is inconsistent judgments on the arbitration issue" in the state and federal court proceedings). This possibility exists because Cohen chose to name both

PaineWebber and Wilhelm as defendants in the state court action. Although such a decision ordinarily would preclude federal adjudication of a case, because removal pursuant to 28 U.S.C. § 1441 would not be possible, the FAA allows any party to an arbitration agreement to file a petition to compel arbitration. 9 U.S.C. § 4. As a result, Cohen's argument that PaineWebber is engaging in impermissible forum shopping is not persuasive.

Cohen's real goal appears to be the avoidance of arbitration on any portion of his dispute. Determining whether the dispute is subject to arbitration, however, is a matter of contract interpretation for which Wilhelm's presence and input is not necessary. Analyzed in this manner, the prejudice that Cohen perceives has nothing to do with Wilhelm's absence from PaineWebber's petition to compel arbitration. Cohen's allegation that PaineWebber's federal petition constitutes forum shopping and allows PaineWebber to accomplish what the federal removal statute prohibits, moreover, presents only one side of an argument that both parties can make. Just as Cohen accuses PaineWebber of forum shopping, it is possible to view Cohen's naming of Wilhelm in the state court action as a strategy solely designed to preclude PaineWebber from removing the action to federal court. Thus, Cohen's forum-shopping accusation against PaineWebber not only ignores what may have motivated his own actions, but also fails to recognize that the FAA allows PaineWebber's petition and that the federal courts have "a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'" *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 15 (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976).

The application of Rule 19 to cases involving joint tortfeasors, moreover, presents a useful analogy involving principles that are relevant to the present case. Specifically, a person's status as a joint tortfeasor does not make that person a necessary party, much less an indispensable party. *Temple v. Synthes Corp.*, 498 U.S. 5, 7-8, 112 L. Ed. 2d 263, 111 S. Ct. 315 (1990) (per curiam) (noting that "it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit"); *MS Dealer Serv. Corp. v. Franklin,* 177 F.3d 942, 946 (11th Cir. 1999) (concluding that a state court complaint identifying the defendants as joint tortfeasors and coconspirators does not make the absent party indispensable).

Although Cohen does not explicitly argue that the status of PaineWebber and Wilhelm as joint tortfeasors makes Wilhelm an indispensable party, the multiple proceedings and inconsistent results in state and federal court that he seeks to avoid can occur whenever joint tortfeasors are not parties to the same lawsuit. This form of prejudice, however, does not require a finding that joint tortfeasors are necessary or indispensable parties. *Temple,* 498 U.S. at 8 (holding that joint tortfeasors were simply permissive parties to an action against one of them); Fed. R. Civ. P. 19 advisory committee notes (clarifying that, under Rule 19(a), "a tortfeasor with the usual 'joint-and-several' liability is merely a permissive party to an action against another with like liability"). For the same reason, the potential prejudice that Cohen fears does not provide a basis for concluding that Wilhelm is an indispensable party.

Furthermore, Cohen's reliance on *Owens-Illinois, Inc. v. Meade,* 186 F.3d 435 (4th Cir. 1999), to support his position that Wilhelm is an indispensable party, is misplaced.

Unlike the present case, where one of two state court defendants has filed a petition to compel arbitration in federal court against the only state court plaintiff, the plaintiff in *Owens-Illinois* filed a petition to compel arbitration in federal court against a select group of the state court plaintiffs who had brought lawsuits to recover for their asbestos-related injuries. *Id.* at 438-39. The petition to compel arbitration did not name as defendants the state court plaintiffs who would destroy complete diversity. 186 F.3d at 439. Applying Rule 19(b), the court held that the absent, non-diverse parties were necessary and indispensable because a significant risk of inconsistent judgments existed, because the district court was unable to craft a remedy to reduce or avoid the potential for prejudice, and because an alternative forum was available in state court that could provide an adequate remedy to all parties. 186 F.3d at 441-42. With regard to the potential prejudice, the court emphasized "the high potential for factual and legal whipsawing" created by the fact that the non-diverse state court plaintiffs who were excluded from the federal action and the diverse state court plaintiffs who were named in the federal petition to compel arbitration might face different legal rights and obligations. *Id.*

The present case is distinguishable from *Owens-Illinois*, primarily because Cohen, the sole plaintiff in the state court action, is a named party in both the state and federal lawsuits. The only reason that he might face inconsistent judgments is that he seeks to hold PaineWebber and Wilhelm jointly and severally liable. As explained previously, Rule 19 was not designed to eliminate this possibility.

The preceding analysis shows that the prejudice identified by Cohen as the basis for determining whether

Wilhelm is an indispensable party is minimal, if it exists at all. Rule 19(b)'s first factor, therefore, does not weigh in favor of dismissing the action. In addition, the second factor of the Rule 19(b) analysis--the extent to which any prejudice can be reduced or eliminated "by protective provisions in the judgment, by the shaping of relief or other measures"--becomes less important because of the small degree of potential prejudice that would occur if this action proceeds without Wilhelm.

With regard to Rule 19(b)'s third factor, a judgment rendered in Wilhelm's absence "will be adequate." Although Cohen would obviously prefer to litigate all of his claims against PaineWebber and Wilhelm in state court, the contractual language might instead obligate him to utilize an arbitral forum. Having to submit claims to arbitration in accordance with a valid arbitration clause, however, does not raise concerns about the adequacy of a judgment. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983) (noting that the FAA creates "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary," and that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability"). Moreover, the previous analysis indicates that the possibility of Cohen having to arbitrate his claims against PaineWebber while proceeding with his claims against Wilhelm in state court does not render a judgment between Cohen and PaineWebber inadequate.

The final factor under Rule 19(b), contrary to the first three, favors dismissal, because the state court presents an alternative forum in which Cohen can bring his claims against both PaineWebber and Wilhelm. However, "the potential existence of another forum does not, in and of itself, outweigh a plaintiff's right to the forum of his or her choice." *Local 670, United Rubber, Cork, Linoleum, & Plastic Workers of Am. v. Int'l Union, United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 822 F.2d 613, 622 (6th Cir. 1987) (holding that the union was not an indispensable party where only the fourth Rule 19(b) factor favored dismissal).

A major policy consideration also weighs against the conclusion that Wilhelm is an indispensable party. Any ruling to the contrary would virtually eliminate the availability of federal courts to enforce arbitration clauses in diversity cases by the simple expedient of one of the parties filing a preemptive suit in state court with at least one non-diverse defendant. As the Court of Appeals for the Second Circuit explained,

> the FAA would be fatally undermined if "the parties" described in [9 U.S.C.] § 4 could be expanded to include persons who had not signed the arbitration clause but who allegedly were involved in the "underlying controversy." If such a rule were adopted, a party resisting arbitration could defeat federal jurisdiction simply by suing someone from the same state, plus the party seeking to compel arbitration, in a separate state lawsuit. Diversity would be destroyed simply by

> claiming that the local defendants in the parallel action were "indispensable parties" to the petition to compel.

Doctor's Assocs., Inc. v. Distajo, 66 F.3d 438, 445 (2d Cir. 1995).

For the foregoing reasons, we conclude that Wilhelm is not an indispensable party to PaineWebber's petition to compel arbitration. The district court therefore erred in dismissing the action.

C. Abstention

The district court did not determine whether abstention was proper under *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976), and *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation,* 460 U.S. 1, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983), because it concluded that the court lacked subject matter jurisdiction over PaineWebber's petition to compel arbitration. On appeal, Cohen once again presents his alternative argument that abstention is appropriate in the present case. Deciding this issue on appeal, rather than remanding the case for the district court's analysis, serves the interest of judicial economy and is proper because additional factual development is not necessary to determine whether the district court should retain jurisdiction over this case. *Brown & Williamson Tobacco Corp. v. FTC,* 710 F.2d 1165, 1172-73 (6th Cir. 1983) (deciding, in the interest of judicial efficiency, to address the merits of arguments for which no additional factual development was necessary, and where the

district court did not consider the issues because it erroneously held that it lacked jurisdiction).

"Abstention from the exercise of federal jurisdiction is the exception, not the rule," *Colorado River Water Conservation Dist.*, 424 U.S. at 813, because federal courts have "a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'" *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 15 (quoting *Colorado River Water Conservation Dist.*, 424 U.S. at 817). In certain "exceptional" circumstances, however, a federal district court may abstain from exercising its subject matter jurisdiction due to the existence of a concurrent state court proceeding, based on "considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Colorado River Water Conservation Dist.*, 424 U.S. at 817 (internal quotation marks and citation omitted).

The Supreme Court has identified eight factors, four in *Colorado River* and four in subsequent decisions, that a district court must consider when deciding whether to abstain from exercising its jurisdiction due to the concurrent jurisdiction of a state court. *Romine v. Compuserve Corp.*, 160 F.3d 337, 340-41 (6th Cir. 1998) (collecting cases and factors). These considerations are:

> (1) whether the state court has assumed jurisdiction over any res or property; (2) whether the federal forum is less convenient to the parties; (3) avoidance of piecemeal litigation; . . . (4) the order in which jurisdiction was obtained[;] . . . (5) whether the source of governing law is state or federal;

(6) the adequacy of the state court action to protect the federal plaintiff's rights; (7) the relative progress of the state and federal proceedings; and (8) the presence or absence of concurrent jurisdiction.

Id. (citations omitted). When considering these factors, we recognize that "the decision whether to dismiss a federal action because of parallel state-court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 16.

The first factor supports federal jurisdiction because the state court did not assume jurisdiction over any res or property. *Romine,* 160 F.3d at 341 (noting that where no property is at issue, the first factor is inapposite and supports exercising jurisdiction). With regard to the second factor, Cohen contends that the federal forum is less convenient because the state court can exercise jurisdiction over all the parties and can resolve every issue in a single proceeding. This argument is misplaced, however, because the second factor relates to geographical considerations, not to the relative jurisdictional scope of state versus federal courts. Compare *Colorado River Water Conservation Dist.*, 424 U.S. at 820 (noting that "the 300-mile distance between the District Court in Denver and the [relevant state court]" is a significant factor supporting abstention) with *Romine,* 160 F.3d at 341 (concluding that "we cannot find that the federal forum in this case is any less convenient than the state forum, since both actions are pending in courthouses in the same city"). Because both the state courthouse and the federal courthouse in question are located in Cincinnati, Ohio, the second factor

counsels against federal abstention. *Romine,* 160 F.3d at 341 (concluding that the second factor supports jurisdiction where the courthouses in which the state and federal actions are pending are both located in the same city).

The third factor, contrary to Cohen's argument, provides little support for declining to exercise federal jurisdiction. For the same reasons that the threat of piecemeal litigation does not make Wilhelm an indispensable party, the desire to avoid litigating a single issue in multiple forums is insufficient to overcome the strong federal policy supporting arbitration. *Moses H. Cone Mem'l Hosp.,* 460 U.S. at 20 (noting that "the relevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement") (emphasis in original); *First Franklin Fin. Corp. v. McCollum,* 144 F.3d 1362, 1364 (11th Cir. 1998) (determining that, in the context of a petition to compel arbitration under the FAA, "the potential for piecemeal litigation . . . has 'no force'") (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 19); *Snap-On Tools Corp. v. Mason,* 18 F.3d 1261, 1265-66 (5th Cir. 1994) (same).

With regard to the fourth factor, the state court obtained jurisdiction of the action only two days before PaineWebber filed its petition in federal court to compel arbitration. This minimal temporal delay is insignificant. *Moses H. Cone Mem'l Hosp.,* 460 U.S. at 21 (noting that "priority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions," and finding that a 19-day difference between the filings of the state court and federal court actions was immaterial given the absence of

progress in the state court action and the substantial proceedings that had occurred in the federal court action).

Indeed, prior to being served with Cohen's state court complaint, PaineWebber lacked any reason to file its petition, because it had no knowledge of a dispute between itself and Cohen. *See Id.* (determining that the 19-day lapse was understandable because the federal court plaintiff did not learn of the state court plaintiff's refusal to arbitrate the dispute until the day before the state action was filed); *First Franklin Fin. Corp.*, 144 F.3d at 1364-65 (deciding that the order in which jurisdiction was obtained weighed against dismissal, even though the state court action was filed three weeks before the federal court action, because the federal court petitioner acted promptly once it learned that the state court plaintiff would not arbitrate the dispute).

The fifth factor also tilts the balance in favor of jurisdiction, because the FAA provides the source of law for interpreting the arbitration clauses in Ginsburg's contracts. *First Franklin Fin. Corp.*, 144 F.3d at 1365 (determining that where a petition to compel arbitration was brought pursuant to the FAA, the fifth factor supports exercising federal jurisdiction); *Snap-On Tools Corp.*, 18 F.3d at 1266 (concluding that federal law provides the rule of decision where the sole issue is "whether the case should be submitted to arbitration under § 4 of the FAA"). Although this factor is less significant where the state and federal courts have concurrent jurisdiction, *Romine*, 160 F.3d at 342 (citing *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 25), the Supreme Court has emphasized that "our task in cases such as this is not to find some substantial reason for the exercise of federal jurisdiction by the district court; rather, the task is to ascertain

whether there exist exceptional circumstances, the clearest of justifications, that can suffice under *Colorado River* to justify the surrender of that jurisdiction." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 25-26 (emphasis in original) (internal quotation marks omitted).

Applying the sixth factor to this case presents the strongest basis for abstaining, because the state court action is adequate to protect PaineWebber's interests. The FAA extends Congress's legislative authority to the maximum extent permitted under the Commerce Clause, and is therefore binding on state courts that interpret contracts involving interstate commerce. *Southland Corp. v. Keating*, 465 U.S. 1, 16, 79 L. Ed. 2d 1, 104 S. Ct. 852 (1984) (holding that a California law that conflicted with the FAA violated the Supremacy Clause). PaineWebber's rights under the FAA would thus be protected in the state court proceeding.

The seventh factor, however, once again points toward exercising federal jurisdiction, because the state court action has not progressed to any significant degree. PaineWebber filed its petition to compel arbitration only two days after Cohen filed his state court action, and the state court issued a temporary restraining order to preserve evidence and records on the day PaineWebber filed its federal petition. *Cf. Romine,* 160 F.3d at 342 (finding that the seventh factor supported abstention where the state court had entered several orders and the parties had begun discovery, whereas the federal action remained in the initial pleading stage as a result of the district court's decision to stay the proceeding before it).

Finally, the eighth factor--the presence of concurrent jurisdiction--only marginally, if at all, favors abstention. Indeed, the preceding discussion of the fifth factor clarifies that the eighth factor is insufficient to justify abstention despite concurrent jurisdiction in state and federal court where a congressional act provides the governing law and expresses a preference for federal litigation. Compare *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 25 n. 32 (emphasizing that the FAA "represents federal policy to be vindicated by the federal courts where otherwise appropriate") with *Romine*, 160 F.3d at 342 (concluding that because "the Securities Act of 1933 not only provides that federal securities law actions under the 1933 Act may be brought in state courts, but also bars removal of such actions brought in state court," the eighth factor favored dismissal).

The above analysis demonstrates that only the sixth factor clearly supports abstention. All of the other factors are either neutral or supportive of federal jurisdiction. The fact that the state court will protect PaineWebber's rights under the FAA, moreover, does not provide the "exceptional" circumstances necessary to justify abandoning the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Water Conservation Dist.*, 424 U.S. at 817, 818. As a result, we conclude that the district court should not abstain from exercising its jurisdiction over PaineWebber's petition.

III. CONCLUSION

For all the reasons set forth above, we REVERSE the judgment of the district court and REMAND the case for further proceedings consistent with this opinion.

DISSENT:

BRIGHT, Circuit Judge, dissenting. I dissent. The district court was correct in concluding that Richard Wilhelm is a necessary and indispensable party pursuant to Federal Rule of Civil Procedure 19. Wilhelm's presence destroys diversity jurisdiction, the sole basis for federal jurisdiction over this matter. As a result, this case belongs in the state court.

As the majority acknowledges, the district court properly decided that Wilhelm was a necessary party because he was covered by the arbitration clause in agreements entered into by Ginsburg and PaineWebber.[1] Therefore, Wilhelm could claim an interest in the contract between Ginsburg and PaineWebber. Having resolved that Wilhelm is a necessary party whose presence deprives the federal court of jurisdiction, the majority labors to preserve jurisdiction by concluding erroneously, in my opinion, that Wilhelm is not an indispensable party under Rule 19(b).

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[1] The majority contends that the agreement's terms "arguably benefit employees like Wilhelm by enabling them to arbitrate complaints." The district court specifically determined that "Wilhelm is covered by the Agreement based on Mr. Barry's affidavit and the language of the Agreement." (J.A. at 100). Neil Barry, Corporate Vice President and Assistant General Counsel at PaineWebber, swore an affidavit explicitly stating that Wilhelm, as an employee of PaineWebber, was covered by the arbitration clause in the agreements.

The majority minimizes the prejudice Cohen will face if he is forced to litigate this matter in state court against Wilhelm and in the federal court against PaineWebber.[2] Additionally, the majority discounts the prejudice to Wilhelm if he is forced to defend himself in state court without the support of his employer.

Permitting this suit to continue in both the state and the federal courts could subject the parties to conflicting legal obligations because both courts will likely be asked to make determinations on the validity and interpretation of the same arbitration agreement. This creates a needless risk of inconsistent results. As the district court noted, the risk of factual and legal whip-sawing weighs heavily in favor of having one court adjudicate this entire matter.[3]

The majority concludes that this risk of piecemeal litigation resulting from parallel proceedings is a "necessary and inevitable consequence" of the FAA's policy favoring arbitration. This contention is misplaced for several reasons. First, the cases cited, *Moses H. Cone Mem'l Hosp.* and

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[2] Litigation in today's world is truly expensive. No litigant should be forced into two forums to resolve a dispute.

[3] The majority argues that Cohen's position of having to litigate in both state and federal courts is the result of his decision to file suit in state court instead of demanding arbitration. This argument is based on the assumption that arbitration is required in this case. This decision has not been reached by any court and it is not this court's function to decide whether Cohen is bound to arbitrate at this time.

Distajo, condone piecemeal litigation where one of the parties to the underlying dispute is not a party to the arbitration agreement. In the instant case, the district court concluded Wilhelm was covered by the arbitration clause even though he did not sign it. Cohen raises claims against Wilhelm and PaineWebber alleging substantially the same misconduct, and Wilhelm and PaineWebber's arbitration claims are inextricably linked. In this situation, there is absolutely no need for parallel proceedings.

The other problem with the majority's logic is its assumption that a policy in favor of arbitration under the FAA necessitates a federal forum. Congress did not enact a policy in favor of arbitration as ordered by federal courts. As the majority admits in its consideration of the Rule 19(b) alternative fora prong, the state court would be perfectly capable of protecting both PaineWebber and Cohen's rights, adjudicating the dispute, interpreting the arbitration agreement, and resolving all the matters related to this common cause of action. [4]

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[4]The majority opinion does not account for the amount of progress made in the Hamilton County Common Pleas Court. The state court issued a temporary restraining order to preserve evidence. Furthermore, as the federal district court explained, the state court held a case management conference on October 31, 2000, where the court set a trial date of June 25, 2001, and established deadlines for the completion of discovery and filing pretrial motions and trial briefs. Apart from the parties' agreement to not proceed with the state court action while the federal action was pending, there is every indication that the state court would have addressed this matter in a timely fashion.

The majority expresses concern that affirming the district court would set a dangerous precedent whereby defendants could defeat arbitration by joining non-diverse parties. This position evinces an unnecessary distrust of both state courts and federal district courts. In regard to state courts, neither party presents the argument that state courts in general, or that the Ohio courts in particular, shirk their duty to enforce lawful arbitration agreements under the FAA.

Furthermore, the majority's policy implication is not tenable because decisions to dismiss based on nonjoinder of parties are to be made pragmatically and based on the particularized context of each case. *See e.g., Owens-Illinois, Inc. v. Meade,* 186 F.3d 435, 441 (4th Cir. 1999) (explaining that dismissal based on nonjoinder must be made "pragmatically, in the context of the substance of each case, rather than by procedural formula") (quoting *Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102, 119 n.16, 19 L. Ed. 2d 936, 88 S. Ct. 733 (1968)). Federal district courts are fully capable of distinguishing between a situation where non-diverse parties are joined solely to defeat federal jurisdiction and the situation where a non-diverse party who is covered by an arbitration agreement must be joined under Rule 19 as a necessary and indispensable party.

Finally, I strongly disagree with the majority's reaching out to decide the issue of abstention. The district court did not rule on this issue and so it is not properly before this court on appeal. To me, it sets a bad precedent for an appellate court, except in unusual circumstances not present here, to decide an issue not ruled on by the trial court. I think it only proper to remand that issue to the able district judge. The question of abstention here is far from clear. The district

court may well ask for additional evidence and briefing on the subject.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. C-1-00-611

[Filed January 31, 2001]

PAINEWEBBER, INC.,	)
Petitioner,	)
	)
v.	)
	)
ALFRED M. COHEN,	)
EXECUTOR OF THE ESTATE	)
OF SAMUEL GINSBURG,	)
Respondent.	)
	)

ORDER

The above styled case is before the Court on Petitioner Amended Motion to Compel Arbitration and Stay state court proceedings (doc. no. 11), and Petitioner's Motions for Arbitration and Stay (doc. nos. 4 and 9). Also pending is Respondent's Motion to Dismiss (doc. no. 8), Petitioner's Memorandum in Opposition (doc. no. 13), Respondent's Reply (doc. no. 14), and Petitioner's Surreply. Pursuant to the Court's Order of October 26, 2000, the parties have filed

proposed Findings of Facts and Conclusions of Law (doc. nos. 20, 21, and 22).

As the Court stated in a previous order, the parties are disputing the jurisdiction of this Court. In the October 26, 2000 Order, the Court concluded that diversity jurisdiction should be determined according to the petition filed in federal court and the Court determined that the face of the petition alleges diversity jurisdiction. Before the Court now is whether Richard Wilhelm, whose presence would destroy diversity jurisdiction, is a necessary and indispensable party that must be joined pursuant to Federal Rule of Civil Procedure 19.

FACTS AND PROCEDURAL HISTORY

PaineWebber enters into arbitration agreements with its customers. On August 11, 1992, Samuel Ginsburg entered into a written contract with PaineWebber, called the "Client's Agreement," whereby Mr. Ginsburg agreed to arbitrate disputes between himself and PaineWebber.

That contract specifically provides as follows:

- ARBITRATION IS FINAL AND BINDING ON THE PARTIES.

- THE PARTIES ARE WAIVING THEIR RIGHT TO SEEK REMEDIES IN COURT, INCLUDING THE RIGHT TO JURY TRIAL.

- PRE-ARBITRATION DISCOVERY IS

GENERALLY MORE LIMITED THAN AND DIFFERENT FROM COURT PROCEEDINGS.

- THE ARBITRATOR'S AWARD IS NOT REQUIRED TO INCLUDE FACTUAL FINDINGS OR LEGAL REASONING AND ANY PARTY'S RIGHT TO APPEAL OR TO SEEK MODIFICATION OF RULINGS BY THE ARBITRATORS IS STRICTLY LIMITED.

- THE PANEL OF ARBITRATORS WILL TYPICALLY INCLUDE A MINORITY OF ARBITRATORS WHO WERE OR ARE AFFILIATED WITH THE SECURITIES INDUSTRY.

I AGREE, AND BY CARRYING AN ACCOUNT FOR ME PAINEWEBBER AGREES, THAT ANY AND ALL CONTROVERSIES WHICH MAY ARISE BETWEEN ME AND PAINEWEBBER CONCERNING ANY ACCOUNT, TRANSACTION, DISPUTE OR THE CONSTRUCTION, PERFORMANCE, OR BREACH OF THIS OR ANY OTHER AGREEMENT, WHETHER ENTERED INTO PRIOR, ON OR SUBSEQUENT TO THE DATE HEREOF, SHALL BE DETERMINED BY ARBITRATION. ANY ARBITRATION UNDER THIS AGREEMENT SHALL BE HELD UNDER AND PURSUANT TO AND BE GOVERNED BY

> THE FEDERAL ARBITRATION ACT, AND SHALL BE CONDUCTED BEFORE AN ARBITRATION PANEL CONVENED BY THE NEW YORK STOCK EXCHANGE, INC. OR THE NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC. I MAY ALSO SELECT ANY OTHER NATIONAL SECURITIES EXCHANGE'S ARBITRATION FORUM UPON WHICH PAINEWEBBER IS LEGALLY REQUIRED TO ARBITRATE THE CONTROVERSY WITH ME, INCLUDING, WHERE APPLICABLE, THE MUNICIPAL SECURITIES RULE MAKING BOARD. SUCH ARBITRATION SHALL BE GOVERNED BY THE RULES OF THE ORGANIZATION CONVENING THE PANEL. I MAY ELECT IN THE FIRST INSTANCE THE ARBITRATION FORUM, BUT IF I FAIL TO MAKE SUCH ELECTION, BY REGISTERED LETTER OR TELEGRAM ADDRESSED TO YOU AT YOUR MAIN OFFICE, BEFORE THE EXPIRATION OF FIVE DAYS AFTER RECEIPT OF A WRITTEN REQUEST FROM YOU TO MAKE SUCH AN ELECTION, THEN YOU MAY MAKE SUCH ELECTION. THE AWARD OF THE ARBITRATORS OR OF THE MAJORITY OF THEM, SHALL BE FINAL, AND JUDGMENT UPON THE AWARD RENDERED MAY BE ENTERED IN ANY COURT OF COMPETENT JURISDICTION.

The foregoing language was bolded and capitalized in the "Client's Agreement."

Subsequent to the "Client's Agreement," on August 13, 1998, Samuel J. Ginsburg executed another contract with PaineWebber, called the "Master Account Agreement," whereby Mr. Ginsburg again agreed to arbitrate disputes between himself and PaineWebber.

The "Master Account Agreement" entered into between PaineWebber and Mr. Ginsburg provided as follows:

ARBITRATION

- Arbitration is final and binding on the parties.

- The parties are waiving their right to seek remedies in court, including the right to jury trial.

- Pre-arbitration discovery is generally more limited than and different from court proceedings.

- The arbitrator's award is not required to include factual findings or legal reasoning and any party's right to appeal or to seek modification of rulings by the arbitrators is strictly limited.

- The panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with the securities industry.

Client agrees, and by carrying an account for Client the Firm agrees that, any and all controversies which may arise between the Firm, any of Firm's employees or agents and Client concerning any account transaction, dispute or the construction, performance, or breach of this or any other agreement, whether entered into prior, on or subsequent to the date hereof, shall be determined by arbitration. Any arbitration under this agreement shall be held under and pursuant to and be governed by the Federal Arbitration Act, and shall be conducted before an arbitration panel convened by the New York Stock Exchange, Inc. or the National Association of Securities Dealers Inc. Client may also select any other national securities exchange's arbitration forum upon which the Firm is legally required to arbitrate the controversy with the Client, including where applicable, the Municipal Securities Rule Making Board. Such arbitration shall be governed by the rules of the organization convening the panel. Client may elect in the first instance the arbitration forum, but if Client fails to make such election, by certified mail, return receipt requested, or telegram addressed to the Firm at its main office, and to the attention of the Legal Department, before the expiration of five (5) days after receipt of a written request from the Firm to make such election then the Firm may make such election. The award of the arbitrators, or of the majority of them,

> shall be final, and judgment on the award rendered may be entered in any court of competent jurisdiction.

The "Master Account Agreement" specifically provided that "BY SIGNING BELOW, I ACKNOWLEDGE AND AGREE; ... that in accordance with the last paragraph of the Master Account Agreement entitled, "Arbitration," I am agreeing in advance to arbitrate any controversies which may arise with PaineWebber in accordance with the terms outlined therein..."

Samuel J. Ginsburg passed away on October 9, 1999. Respondent, Alfred M. Cohen, is the duly appointed and acting Executor of the Estate of Samuel J. Ginsburg.

Petitioner PaineWebber, Inc. is a registered securities broker. It maintains two sales offices in Hamilton County, Ohio, one of which is located on the thirty-third floor of the 312 Walnut Street Building (the downtown Cincinnati office). Richard Wilhelm, who is resident of Ohio, was the branch manager of PaineWebber's downtown Cincinnati office. Mr. Ginsburg had several accounts with PaineWebber at its downtown Cincinnati office. From 1992 through 1999, PaineWebber employed Richard Zenni as its broker at the downtown Cincinnati office.

On July 26, 2000, Cohen filed a Compliant and Jury Demand in the action captioned *Cohen v. PaineWebber, Inc.* Case No. A0004567, in Hamilton County, Ohio Court of Common Pleas. In that complaint, Cohen asserts causes of action sounding in tort for unlawful conversion and fraudulent concealment, and seeks punitive damages, against

PaineWebber and Richard Wilhelm joint tortfeasors. On July 28, 2000, PaineWebber filed its Petition to Compel Arbitration, Enforce Arbitration Agreement, and Stay Civil Action (the Petition) in this Court.

On August 21, 2000, the parties submitted an agreed standstill agreement to the Hamilton County Common Pleas Court, which the Common Pleas Court entered. Under the terms of that entry, the parties agreed that no action would be taken in the Hamilton County action until this Court had an opportunity to make a determination on PaineWebber's petition to compel arbitration.[1]

On October 31, 2000, the Hamilton County Common Pleas Court held a case management conference in the Hamilton County Action. At that conference, the Common Pleas Court scheduled a trial date of June 25, 2001 and assigned various other deadlines for the completion of discovery and for the filing of pretrial motions and trial briefs in the Hamilton County Action.

LAW AND ANALYSIS

As stated above, the issue before the Court is whether Richard Wilhelm is a necessary and indispensable party to this action under Rule 19. Respondent Cohen, for jurisdictional purposes, is a resident of Ohio. Petitioner PaineWebber, for jurisdictional purposed, is a resident of Delaware and New

---

[1] The agreement of the parties to stay the Hamilton County Action renders Petitioner's Motions to Stay (doc. no. 4-2 and doc. No. 9-1) **MOOT**.

York. Richard Wilhelm is a resident of Ohio. If it is determined that Wilhelm is necessary and indispensable, his presence would destroy jurisdiction. Where joinder of a party would destroy subject matter jurisdiction, the court must dismiss the action if the party is 'indispensable' to the litigation.

"The first step in determining the question of joinder under Rule 19 is whether a person is necessary to the action and should be joined if possible." *Soberay Machine & Equipment Co. v. MRF Limited, Inc.*, 181 F.3d 759, 763-64 (6th Cir. 1999). F.R.C.P. 19(a) provides:

> (a) **Persons to be Joined if Feasible**. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (I) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may

> be made a defendant, or in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

"[I]n the absence of personal jurisdiction, or if venue as to the person is improper, the court must proceed to ... 19(b)." *Soberay*, 181 F.3d at 764. F.R.C.P. 19(b) provides:

> **(b) Determination by Court Whenever Joinder not Feasible.** If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgement, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; forth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

A decision to dismiss based on nonjoinder "must be made pragmatically, in the context of the substance of each case, rather than by a procedural formula," *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 119 n.16 (1968), "by considering all "the practical potential for prejudice" to all parties, including those not before it." *Owens-Illinois Inc. v. Meade*, 186 F.3d 435, 441 (4th Cir. 1999) (quoting *Schlumberger Indus., Inc. v. National Sur. Corp.*, 36 F.3d 1274, 1286 (4th Cir. 1994)). "It is to be stressed that the criteria set forth in Rule 19 are not to be applied mechanically nor are they to be used to override compelling substantive interests." *Schutten v. Shell Oil Co.*, 421 F.2d 869, 873 (5th Cir. 1970). "In applying Rule 19 the courts must refrain from taking a view either too broad or too narrow in determining 'prejudicial' effect of a judgment. The watchwords of Rule 19 are 'pragmatism' and 'practicality.'" *Id.* at 874.

In *MS Dealer Service Corp. v. Franklin* 177 F.3d 942 (11th Cir. 1999), Sharon Franklin and Jim Burke Motors, Inc. (Burke) executed a contract whereby Franklin agreed to purchase a vehicle from Burke. The contract included a service contract through MS Dealer. The contract also included an arbitration clause. *Id.*

After buying the vehicle, Franklin discovered defects in the car and filed suit in Alabama state court against Burke, MS Dealer and Chrysler Credit Corporation. *Id.* MS Dealer then filed a petition in federal court to compel Franklin to arbitrate her claims pursuant to the FAA. The *MS Dealer* court determined that diversity jurisdiction should be decided based solely on the petition filed in federal court and not whether the underlying state court action was removable. In

that action, Franklin also argued that a coconspirator/joint tortfeasor (Burke) named in the underlying state action was an indispensable party and would thus destroy diversity in the federal action. The *MS Dealer* court stated that a "tortfeasor with the usual joint-and-several liability is merely a permissive party to an action against another of like liability." *Id.* at 946 (citations omitted). The *MS Dealer* court found that Burke was "not indispensable with respect to Franklin's claims against *MS Dealer*." Id. at 946. The *MS Dealer* case is clearly distinguishable from the case at bar. In the *MS Dealer* case, the court pointed out that "(1) an arbitrator has already ruled in favor of Jim Burke on all of Franklin's claims against it and (2) the state court has dismissed Franklin's claims against Jim Burke with prejudice." *Id.* at 946. The *MS Dealer* court then reasoned, "[i]n light of the binding ruling in favor of Jim Burke and its dismissal from the state court action with prejudice, Jim Burke is not an indispensable party." *Id.* In the case before this Court, Cohen's claims against Wilhelm are still pending in the state court action.

The *MS Dealer* court also addressed whether the district court properly denied MS Dealer's petition to compel arbitration on the ground that MS Dealer was not a signatory to the contract. *Id.* at 946. The court found that there were at least three exceptions which allowed a nonsignatory to a contract to compel arbitration (1) equitable estoppel, (2) "when under agency or related principles, the relationship between the signatory and nonsignatory defendants is sufficiently close that only by permitting the nonsignatory to invoke arbitration may evisceration of the underlying arbitration agreement between the signatories be avoided" and (3) "when the parties to a contract together agree, upon formation of their agreement, to confer certain benefits

thereunder upon a third party, affording that third party rights of action against them on the contract," *Id.* at 947 (quoting *Sunkist Soft Drinks, Inc. v. Sunkist, Growers, Inc.* 10 F.3d 753 (11th Cir. 1993) and (quoting *Boyd v. Homes of Legend, Inc.*, 981 F.Supp. 1423 (M.D. Ala. 1997)).

Equitable estoppel allows a nonsignatory to compel arbitration in two circumstances. The first is "when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory." *Id.* (quoting *Sunkist Soft Drinks,* 10 F. 3d at 757. "Application of equitable estoppel is [also] warranted ...when the signatory to the contract containing the arbitration clause raises allegations of ... substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." *Id.* (quoting, *Boyd* 981 F.Supp. At 1433).

The *MS Dealer* court determined that "[b]oth of the circumstances giving rise to equitable estoppel exist" because "Franklin's claims against MS Dealer makes reference to and presumes the existence of the ... contract" and "each of her fraud and conspiracy claims depends on her contractual obligation ..." *Id.* at 947-48. The court also determined that the claims against MS Dealer and Burke were inseparable because Franklin alleged that they were conspiring. *Id.*

As stated above, the arbitration portion of PaineWebber's "Master Account Agreement" stated that "any and all controversies which may arise between the Firm, any of the Firm's employees or agents and Client concerning any account, transaction, dispute ... shall be determined by arbitration." In the affidavit of Neil Barry, Corporate Vice

President and Assistant General Counsel at PaineWebber, Inc., Mr. Barry states that "Richard Wilhelm, Branch Manager of the Cincinnati office, has been an employee of PaineWebber since June 1989 and is also covered by the Arbitration Clause contained in these Agreements." Doc. 11, Ex. C. Thus, although Wilhelm is a nonsignatory, he may be able to compel arbitration in appropriate circumstances. Cohen raises claims against Wilhelm and PaineWebber alleging substantially interdependent misconduct. It could be interpreted that the parties to the contract apparently confer the benefit of the arbitration agreement on Wilhelm, and that Wilhelm's relationship with PaineWebber is sufficiently close that only by permitting the nonsignatory to invoke arbitration may evisceration of the underlying agreement be avoided.

In *Doctor's Associates, Inc. v. Distajo*, 66 F.3d 438, 445 (2nd Cir. 1995), the court determined that 'diversity of citizenship is determined by reference to the parties named in the proceeding before the district court, as well as any indispensable parties who must be joined pursuant to Rule 19." See *Prudential-Bache Sec., Inc. v. Fitch*, 966 F.2d 981, 988 (5th Cir. 1992) ("jurisdiction for a petition to compel arbitration [must] be determined from the face of the petition"). The *Doctor's Assoc.* court went on to say that "individuals who are not parties to the arbitration agreement cannot be 'indispensable' parties under Rule 19(b) if they do not meet either of the threshold tests of 19(a)." *Id.* at 446. The court determined that the parties at issue were not indispensable because "complete relief" could be afforded with those parties i.e. an order compelling arbitration, and the possible prejudice of piecemeal litigation is overcome by the FAA's strong bias in favor of arbitration. *Id.* at 446. The *Doctor's Assoc.* court concluded that "[a] district court

should not consider the citizenship of strangers to the arbitration contract, since they are not "parties [to] the suit arising out of the controversy within the meaning of the FAA." *Id.* However, this Court has determined that Wilhelm is covered by the Agreement based on Mr. Barry's affidavit and the language of the Agreement. Thus, it could be interpreted that Wilhelm is not a stranger to the arbitration contract for the reasons discussed above.

Further, the Sixth Circuit U.S. Court of Appeals has not held that an agent may never be considered an indispensable party; but rather, has stated that the facts of a case must be examined before making this determination. *Soberay*, 181 F.3d at 765. The Sixth Circuit "recognized long held Supreme Court precedent stating that thee is no prescribed formula for determining whether a party is indispensable," (citing, *Nile-Bement-Pond Co. v. Iron Moulder's Union,* 254 U.S. 77, 80 (1920)).

The case sub judice is distinguishable from *Local 670, United Rubber, Cork Linoleum and Plastic Workers of America v. International Union*, 822 F.2d 613 (6th Cir. 1987). In *Local 670*, a Tennessee local (Local 670) brought an action against Armstrong Rubber Company (the Company) alleging the Company had breached the collective bargaining agreement by entering into a new wage agreement with a California local (Local 703) and shifting work from Local 670 to Local 703. *Id.* Local 670 and Local 703 were two of five locals signatory to a master collective bargaining agreement with the Company. "In addition to the single master agreement, each local union also enter[ed] into supplemental agreements addressing issues specific to that local and

supplementing, but not contradicting or amending, the master agreement." *Id.* at 615.

The Company entered into an agreement with Local 703 reducing wages at the Hanford, California plant, *Local 670*, 822 F.2d at 615. Local 670 contended that the Company had no right to alter the basic wage structure of one local in a supplemental agreement. *Id.* at 616. Local 670 also argued that after the Company reduced wages with Local 703, the Company laid off members of Local 670 and increased work with Local 703. *Id.*

The *Local 670* court determined that under 19(a)(2), "Local 703's interest in upholding the validity of its wage reduction agreement ... is sufficiently 'related to' the subject of the action ... to make its joinder desirable. *Id.* at 620. The court also found that the Company's "risk of incurring inconsistent obligations as a result of arbitrating the questions of validity of its subsequent bilateral agreement without Local 703's presence also renders joinder the preferable course." *Id.* However, the Local 670 court concluded that 703 was not an indispensable party. *Id.* at 621. The court reasoned that the "contract between Local 703 and [the Company] is not the contract which is the subject of Local 670's grievance here." *Id.* The court explained, "it becomes clear that the contract between Local 703 and [the Company] is wholly collateral to the issue in this proceeding, which is the arbitrability of the alleged breach of the contract between the [C]ompany and Local 670." *Id.* at 622. The court stated that

> no conclusion is reached as to the substantive rights of any of the parties ... While Local 703's presence at the arbitration proceeding

> may arguably be deemed 'indispensable,' that is not the question before the court at this time ... Clearly, then, the district court erred in this portion of its analysis by looking solely to the consequences of the substantive outcome of an arbitration hearing conducted in Local 703's absence.

Id. at 622.

In the case at bar, Wilhelm and PaineWebber are covered by the same contract, therefore the contract covering Wilhelm cannot be said to be wholly collateral to the issue in this proceeding. Also this Court is not looking solely to the consequences of the substantive outcome of an arbitration hearing conducted in Wilhelm's absence. Rather, this Court is looking at possible inconsistent decisions regarding whether arbitration is even required in the case against PaineWebber and the case against Wilhelm. In other words, two different courts would be called on to interpret the same contract. "Furthermore, one of the purposes, though not the sole purpose, of Rule 19 is the avoidance of multiple litigation of essentially the same issues." *Schutten v. Shell Oil Co.*, 421 F.2d 869, 874 (5th Cir. 1970).

The case at bar is most analogous to *Owens-Illinois, Inc. v. Meade* 186 F.3d 435 (4th Cir. 1999). The *Owens-Illinois* appellate court determined that the district court lacked jurisdiction because "the parties excluded from the Petition to Compel were necessary and indispensable parties under Fed. R. Civ. P. 19 and ... their joinder destroys diversity." *Id.* at 438.

In *Owens-Illinois*, Owens entered into settlement agreements with West Virginia attorneys to settle future asbestos tort cases against Owens. This agreement had arbitration provisions. Several plaintiffs from both West Virginia and Ohio filed subsequent tort actions in a West Virginia state court. In order to block this state court action, Owens file a Petition to Compel Arbitration in the U.S. District Court for Southern District of West Virginia naming only the West Virginia plaintiffs and specifically excluding the Ohio plaintiffs. Owens requested a TRO and a Stay of the state court proceedings. *Id.*

The *Owens-Illinois* parties agreed that the only possible independent basis for jurisdiction was diversity of citizenship. The court determined that the Ohio plaintiffs were necessary parties because

> permitting this suit to continue in both the state and federal courts would subject all of the parties to conflicting legal obligations in a manner prohibited by Rule 19(a)(2)(ii). As the district court noted, in the instant case both the courts are being asked to make determinations on the validity and interpretation of the Agreement, creating high likelihood of incongruous results ... If this action was allowed to proceed one court might compel arbitration on the basis of the Agreement, while the other fund that, because Owens-Illinois breached the Agreement, alternative judicial remedies were available to some of the Plaintiffs. This potential for factual and legal 'whip-saw' weighs heavily in favor of having

> one court adjudicate the entire case under all of the affected parties before it.

Id. at 441. The court then concluded that the Ohio plaintiffs were indispensable under rule 19(b).

The court stated:

> the high potential for factual and legal whipsawing indicates the parties will be prejudiced by any judgment rendered in absence of the non-diverse Plaintiffs and, therefore, such a resolution would not be adequate ... it is hard to see how the district court could have tailored a remedy to lessen or avoid the potential for prejudice in this case ... we see no reason why the ... West Virginia [court] will not provide an adequate remedy.

Id. at 441-442. The court concluded that the Ohio plaintiffs were necessary and indispensable parties to the Petition to Compel and their joinder mandated by Rule 19. *Id.* at 442. Because their joinder destroyed complete diversity, the district court lacked subject matter jurisdiction. *Id.*

Like *Owens-Illinois*, permitting this suit to continue in both the state and federal courts would likely subject parties to inconsistent legal obligations in a manner prohibited by Rule 19(a)(2)(ii). Both courts would be asked to make determinations on the validity, interpretation and application of the arbitration agreements. The high potential for whipsawing indicates a likelihood that the parties would be prejudiced. The arbitration clauses of the agreements state

that an award may be entered "in any court of competent jurisdiction." The state court can give arbitration agreements full effect and the state court has jurisdiction over all the parties. This Court sees no reason why the Ohio court could not or would not provide an adequate remedy to all parties.

CONCLUSION

As a practical matter, Richard Wilhelm has an interest relating to the subject of this action and is so situated that his absence would likely leave parties subject to risk of incurring inconsistent obligations. The Court concludes in equity and good conscience that the Petition should be dismissed because Wilhelm is indispensable.

Based on the foregoing, Respondent's Motion to Dismiss (doc. no. 8) is **GRANTED** and Petitioner's Motion for Arbitration (doc. nos. 4 and 9) and Motion to Compel (doc. no. 11) are **DENIED**. This case is **DISMISSED WITHOUT PREJUDICE** for lack of subject matter jurisdiction and **TERMINATED** on the docket of this Court at petitioner's cost.

IT IS SO ORDERED.

/s/_____
Herman J. Weber, Judge
United States District Court

APPENDIX D

FOLD OUT EXHIBIT

TABLE 1

TABLE OF STANDARD OF REVIEW BY CIRCUIT COURT

Table 1 Standard of Review by Circuit Court

Circuit	19(a)	19(b)	Applies a De Novo Review for Cases with Underlying Legal Considerations
First	Undecided	Abuse of discretion	
Second	Undecided	Abuse of discretion	
Third	De Novo Review	Abuse of discretion	
Fourth	Abuse of Discretion	Abuse of Discretion	
Fifth	Undecided	Abuse of discretion	
Sixth	Abuse of discretion	De Novo Review	X
Seventh	Undecided	Undecided	
Eighth	Undecided	Abuse of discretion	
Ninth	Abuse of discretion	Abuse of discretion	X
Tenth	Abuse of discretion	Abuse of discretion	X
Eleventh	Undecided	Abuse of discretion	
District of Columbia	Undecided	Abuse of discretion	

(2)

Supreme Court, U.S.
FILED
AUG 14 2002
OFFICE OF THE CLERK

No. 01-1665

IN THE

Supreme Court of the United States

ALFRED M. COHEN,
EXECUTOR OF THE ESTATE OF SAMUEL GINSBURG,

Petitioner,

v.

UBS PAINEWEBBER INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

What is the appropriate standard for reviewing a district court's ruling that a party is indispensable under Rule 19(b) of the Federal Rules of Civil Procedure?

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STATEMENT

On August 11, 1992, Samuel Ginsburg entered into a "Client's Agreement" with PaineWebber, under which Ginsburg agreed to arbitrate any and all disputes between him and PaineWebber. Among other things, the detailed arbitration provision stated:

> I agree, and by carrying an account for me PaineWebber agrees, that any and all controversies which may arise between me and PaineWebber concerning any account, transaction, dispute or the construction, performance, or breach of this or any other agreement, whether entered into prior, on or subsequent to the date hereof, shall be determined by arbitration. Any arbitration under this agreement shall be held under and pursuant to and be governed by the Federal Arbitration Act . . . .

Pet. App. 33a-34a.

Ginsburg and PaineWebber subsequently executed a "Master Account Agreement" that contains a second arbitration agreement. The second arbitration clause is nearly identical to the first, except that it not only references disputes between Ginsburg and PaineWebber but also specifies that it governs disputes between Ginsburg and "[PaineWebber's] employees or agents." *Id.* at 36a.

On October 9, 1999, Ginsburg died. Soon thereafter, Alfred Cohen, an Ohio resident, was appointed the executor of Ginsburg's estate. *Id.* at 37a.

On July 26, 2000, Cohen filed a civil action in state court against PaineWebber and one of PaineWebber's managers, Richard Wilhelm, seeking damages for alleged wrongdoing by a former broker of PaineWebber, Richard Zenni. In the complaint, Cohen claimed that PaineWebber and Wilhelm committed two torts, unlawful conversion and fraudulent concealment, and sought compensatory and punitive damages. *Id.* at 37a-38a. Because Cohen's action violated not just one,

but two, plainly-worded arbitration agreements, PaineWebber immediately sought to halt the state-court litigation. Accordingly, just two days later, on July 28, 2000, PaineWebber filed a diversity action in federal district court, seeking to compel Cohen to arbitrate the claims under the Federal Arbitration Act. *Id.* at 38a. PaineWebber also filed a motion in state court seeking to stay the action there pending a ruling by the district court on PaineWebber's petition. *Id.* Because the parties ultimately agreed not to proceed with the state court action while the federal petition was pending, the state court did not rule on the motion and with one minor exception no further proceedings occurred in the state court until after the district court ruled on PaineWebber's action.

On January 31, 2001, the district court (Weber, J.) granted Cohen's motion to dismiss PaineWebber's petition for lack of subject matter jurisdiction. Applying Rule 19 of the Federal Rules of Civil Procedure, the district court determined that Wilhelm was a necessary and indispensable party to PaineWebber's petition to compel arbitration. Because Ginsburg was a resident of Ohio, because Cohen is treated as a citizen of the same state as Ginsburg under 28 U.S.C. § 1332(c), and because Wilhelm is a resident of Ohio, the court as an initial matter determined that the presence of Wilhelm in the case would defeat complete diversity. And even though Wilhelm was an agent of PaineWebber, the district court concluded that the continuation of the litigation in state and federal court "would likely subject parties to inconsistent legal obligations," Pet. App. 49a, and at all events it believed that "[t]he state court can give arbitration agreements full effect." *Id.* at 50a. The district court therefore dismissed the arbitration petition.

The Sixth Circuit (Boggs, J., *Gilman*, J., Bright, J.) reversed. It first determined that the district court did not abuse its discretion in concluding that Wilhelm was a necessary party under Rule 19(a). Pet. App. at 9a. Applying *de novo* review to the district court's Rule 19(b) analysis,

however, the court of appeals concluded that Wilhelm was not an indispensable party requiring the dismissal of the federal-court action. *Id.* at 19a.

With respect to the first Rule 19(b) factor—the risk of prejudice to the parties to the federal case—the court rejected Cohen's argument that the continuation of the federal case would subject him to repetitious and piecemeal litigation. The "possibility of having to proceed simultaneously in both state and federal court," the Sixth Circuit concluded, "is a direct result of Cohen's decision to file a suit naming PaineWebber and Wilhelm in state court rather than to demand arbitration under the Master Account Agreement." Pet. App. 11a. Moreover, "the possibility of piecemeal litigation is a necessary and inevitable consequence of the FAA's policy that strongly favors arbitration." *Id.* at 12a. *See id.* (risk of litigation in two forums "'occurs because the relevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement'") (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983)). Rather, the court concluded, "Cohen's real goal appears to be the avoidance of arbitration on any portion of his dispute," which does not suffice to defeat a party's attempt to do what the FAA permits—namely, enforce the arbitration agreement in federal court. Pet. App. 14a.

Nor in the court's view did the second Rule 19(b) factor—the extent to which any prejudice may be reduced "by protective provisions in the judgment"—favor a determination of indispensability. The "small degree of potential prejudice" to Cohen, the court reasoned, makes this factor "less important." Pet. App. 17a.

The court next concluded that a judgment rendered in Wilhelm's absence "will be adequate," consistent with the third inquiry under Rule 19(b). *Id.* "Having to submit claims to arbitration," the court held, "does not raise concerns about the adequacy of a judgment." *Id. See id.* ("the FAA creates 'a

liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary'") (quoting *Moses H. Cone*, 460 U.S. at 24-25).

The court concluded that the fourth factor—whether the plaintiff will have an adequate remedy if the action is dismissed—favors dismissal because Cohen could bring his claims against PaineWebber and Wilhelm in state court. Pet. App. 18a. But in the court's view "the potential existence of another forum does not, in and of itself, outweigh a plaintiff's right to the forum of his or her choice." *Id.* (quotation omitted).

Lastly, the court reasoned that one other consideration "weighs against the conclusion that Wilhelm is an indispensable party." *Id.* "Any ruling to the contrary," the court observed, "would virtually eliminate the availability of federal courts to enforce arbitration clauses in diversity cases by the simple expedient of one of the parties filing a preemptive suit in state court with at least one non-diverse defendant." *Id.* The court therefore reversed the district court's decision to dismiss the federal case.

Judge Bright dissented. He primarily took issue with the majority's conclusion that the "risk of piecemeal litigation resulting from parallel proceedings is a necessary and inevitable consequence of the FAA's policy favoring arbitration." Pet. App. 27a (quotation omitted).

REASONS FOR DENYING THE WRIT

There are at least five reasons why the Court should deny the petition. First, contrary to petitioner's suggestion, the Sixth Circuit's decision does not conflict with any decisions of this Court. Second, petitioner does not deliver on his claim that there is a pertinent lower-court conflict of authority. The cited cases either are inapposite or fail to show that the Sixth Circuit's analysis would have led to a different result had it been embraced in any of these other courts of appeal. Third,

even petitioner does not separately argue that the question is sufficiently important in its own right to warrant review. Fourth, the decision below is correct on the merits. Fifth, the case presents a poor vehicle for reviewing the issue—among other reasons because it arises in the context of the enforcement of an arbitration agreement (unlike all of the cited lower-court cases) and because the ongoing relevance of this dispute could be affected by a pending petition filed on August 13, 2002 that concerns the same parties that are involved in this dispute. For these reasons and those elaborated below, the petition should be denied.

I. The Sixth Circuit's Decision Does Not Conflict With Any Decisions Of This Court.

Petitioner initially argues (Pet. 6) that "[t]his Court . . . has determined abuse of discretion is the appropriate standard of review" for considering the propriety of a district court's determination that a party is indispensable under Rule 19(b). That is wrong.

Petitioner cites just one case, *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968), in support of this proposition, and the case says no such thing. At issue in *Provident Tradesmens Bank* was a "challenge to the scope of the newly amended Rule 19," *id.* at 107, not a challenge to the standard of review governing Rule 19 appeals. Indeed, *Provident Tradesmens Bank* had no opportunity to pass on the standard-of-review question because the Rule 19 issue "emerged for the first time in the Court of Appeals." *Id.* at 109. As the Court acknowledged, "[e]ach of these interests [enumerated in Rule 19(b)] must, in this case, be viewed entirely from an appellate perspective since the matter of joinder was not considered in the trial court." *Id.* Even if the Court had wished to discuss the standard for reviewing trial-level Rule 19(b) decisions, in other words, it had no opportunity to do so in *Provident Tradesmens Bank*. This claimed conflict of authority, in short, is a mirage.

II. Petitioner Has Not Established A Meaningful Lower-Court Conflict Of Authority.

Petitioner next claims (Pet. 7) that "[a] conflict among the circuits exists regarding the appropriate standard of review to apply when considering whether a party is . . . indispensable" under Rule 19(b). This argument, too, overstates the case.

A. The Principal Lower-Court Decisions Upon Which Petitioner Relies Do Not Establish Such A Conflict.

In trying to establish a lower-court conflict, petitioner primarily argues (Pet. 6-8) that the Ninth, Tenth and Fourth Circuits have held that an abuse-of-discretion standard applies to Rule 19(b) decisions. But the cited cases do not sustain this initial contention.

As to the Ninth Circuit, the only cited case involves Rule 19(a). Contrary to petitioner's suggestion, the court in that case did not (and indeed had no opportunity to) issue any holding regarding the standard of review under Rule 19(b). *See Washington v. Daley*, 173 F.3d 1158 (9th Cir. 1999) (concluding that entity was not a necessary party under Rule 19(a)).

As to the Tenth Circuit, the only cited case contains *dictum* supporting petitioner, but nothing else. In *Davis v. United States*, 192 F.3d 951 (10th Cir. 1999), the court to be sure said that "[t]his court reviews Rule 19 determinations under an abuse of discretion standard." *Id.* at 957. But in the decision itself, the court remanded the Rule 19(b) inquiry to the district court for a decision in the first instance. In the court's words: "[T]his court declines to undertake the Rule 19(b) analysis in the first instance and remands to the district court to conduct an analysis of all the factors articulated in Rule 19(b) and make a reviewable determination as to whether the Tribe is an indispensable party." *Id.* at 961. In addition, the court acknowledged that the "[u]nderlying legal conclusions supporting Rule 19 determinations . . . are reviewed *de novo*."

Id. at 957. Of course, that view (whether *dictum* or not) wholly accords with the Sixth Circuit's position on the issue.

As to the Fourth Circuit, the cited case does purport to apply an abuse-of-discretion standard to a Rule 19(b) determination. *See Nat'l Union Fire Ins. Co. of Pittsburgh v. Rite Aid*, 210 F.3d 246 (4th Cir. 2000). But that standard of review was hardly material to the outcome of the case because the court of appeals acknowledged that "all four [Rule 19(b)] factors" supported the trial court's decision. *Id.* at 254. Accordingly, the decision by no means supports the material point that needs to be made here—namely, that two courts of appeals (here the Fourth and Sixth Circuits) are saying *and* doing different things when it comes to the amount of deference owed to trial court Rule 19(b) dismissals. The Fourth Circuit's decision in *Rite Aid* establishes no such conflict.

B. The Second Tier Of Cases Upon Which Petitioner Relies Does Not Establish The Requisite Conflict.

Petitioner does no better in arguing (Pet. 8-9) that six other circuits—specifically, the First, Second, Fifth, Eighth, Eleventh and D.C. Circuits—have embraced an abuse-of-discretion standard. The cited cases, again, do not support this broad claim.

In *Tell v. Trustees of Dartmouth College*, 145 F.3d 417 (1st Cir. 1998), the First Circuit acknowledged that there "is apparently some difference among the circuits as to [the] standard of review of decisions as to necessary joinder under Rule 19(a)," *id.* at 418, but did not reach a similar conclusion with respect to Rule 19(b). As to its review of the underlying trial court decision, it concluded that "the outcome would be the same even if we decided the application issues afresh," *id.* at 419, which is to say the standard of review made no difference in the ultimate disposition of that case. (An earlier First Circuit case, relied upon by petitioner to support its merits argument (Pet. 12), *see The Travelers Indemnity Co. v.*

Dingwell, 884 F.2d 629, 635 (1st Cir. 1999), does appear to establish a conflict with the Sixth Circuit on the Rule 19(b) question. But the detail of the First Circuit's analysis makes it less than apparent how that court's Rule 19(b) standard of review differs from the Sixth Circuit's standard of review.)

In *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998), the Second Circuit acknowledged that a Rule 19(b) dismissal is reviewed "under the abuse of discretion standard." *Id.* at 161. But that discretionary language hardly squares with what the court did in the case, which was to reverse the trial court's dismissal and remand the case "to reconsider the dismissal on Rule 19 grounds." *Id.* at 162. In other words, *de novo* review necessarily would have produced the same outcome.

In *Pulitzer-Polster v. Pulitzer*, 784 F.2d 1305 (5th Cir. 1986), the Fifth Circuit said that "a district court's decision to dismiss for failure to join an indispensable party [under Rule 19(b)] is properly reviewed under an abuse-of-discretion standard." *Id.* at 1309. And in reviewing the trial court's Rule 19(b) dismissal, the Fifth Circuit in fact affirmed the lower-court's dismissal, concluding that "the district court did not abuse its discretion." *Id.* at 1313. All of this would suggest a difference of opinion between the Fifth Circuit and Sixth Circuit on the standard for reviewing Rule 19(b) dismissals, save for one point. A review of the Fifth Circuit's opinion hardly reassures the reader that the court was in fact applying a deferential standard. As the court acknowledged, it affirmed only "after a full consideration of all the factors enumerated in Rule 19," *id.*, and the depth of its analysis of those factors is exceedingly difficult to distinguish from the *de novo* review given by the Sixth Circuit in this case.

In *United States ex rel. Steele v. Turn Key Gaming, Inc.*, 135 F.3d 1249 (8th Cir. 1998), the Eighth Circuit also said that it reviewed district court dismissals "under Rule 19(b) for an abuse of discretion." *Id.* at 1251. But that standard of review did not change the outcome in the case because the court

ultimately reversed the lower court dismissal. More, the contents of the appellate court's analysis again bear more similarity to *de novo* review than to abuse-of-discretion review. *See id.* ("After reviewing the record, we conclude that the district court erred by finding that the Tribe would be prejudiced if this action continues in its absence.").

In *Torcise v. Community Bank of Homestead*, 116 F.3d 860 (11th Cir. 1997), the Eleventh Circuit affirmed a district court (and, before that, a bankruptcy court) decision concluding that an entity was not a necessary party under Rule 19(a). While the court purported to apply an abuse-of-discretion standard, that has no bearing on the appropriate standard for Rule 19(b) dismissals.

In *Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491 (D.C. Cir. 1995), the D.C. Circuit said that it reviewed a "district court's determination that Kansas was not an indispensable party under Rule 19(b) for abuse of discretion." *Id.* at 1495. But it nonetheless proceeded to reverse the district court's decision, proving that the outcome of the case was not affected by the court's application of the less stringent standard of review. *Id. See also id.* at 1497 ("Thus, notwithstanding the discretion generally accorded to the district court to consider which factors to weigh and how heavily to emphasize certain considerations, the district court was confronted with a more circumscribed inquiry when it assessed whether the Tribe's lawsuit could proceed.") (quotation omitted).

In the last analysis, these cases do not establish the deep conflict of authority that petitioner advertises. Some are merely Rule 19(a) cases. Others involve only *dicta*. Still others fail to demonstrate that the standard of review made any difference in the outcome of the case. And all of the cases, even the Fifth Circuit's decision in *Pulitzer* and the First Circuit's decision in *Travelers*, appear to have been situations in which the parties themselves did not even debate the appropriate standard of review. Under these circumstances,

the conflict is at best shallow and at worst non-existent. The issue warrants further percolation in the lower courts.

C. Any Conflict Of Authority Concerning The Rule 19(a) Standard Of Review Is Immaterial.

Presumably trying to shore up its efforts to establish a conflict in the lower courts regarding Rule 19(b), petitioner next argues (Pet. 8-11) that a conflict exists with respect to the appropriate standard of review for Rule 19(a) trial court decisions. But even if such a conflict exists, it would not support the petition. In this case, the district court and the Sixth Circuit both agreed with petitioner that Richard Wilhelm was a necessary party under Rule 19(a). Petitioner is in no position to seek review of an issue upon which he prevailed below. The Rule 19(a) cases, in short, have no bearing on this case.

III. Petitioner Does Not Separately Argue That The Issue Is Sufficiently Important To Warrant Review.

At no point does petitioner independently argue that this federal question is of sufficient magnitude otherwise to deserve review. In view of the inapposite cases upon which petitioner relies, or the *dicta*-infused nature of many of those decisions, this is precisely the kind of issue that will benefit from further percolation in the lower courts and that is exceedingly unlikely to generate any litigation crises in the interim. The closest petitioner comes to arguing to the contrary is to say (Pet. 9) that the alleged lower-court variations affect "the faith of the public in the judicial system." But if this modest issue affects the public's faith in the judiciary, then it would seem that every federal question does so as well. The argument thus not only paints too fragile a picture of the public's trust in the courts but also does not provide a meaningful ground for distinguishing this petition from virtually every other one.

IV. The Sixth Circuit's Decision Is Correct On The Merits.

After repeating (Pet. 11) the erroneous conclusion that *Provident Tradesmens Bank* has already resolved this issue, petitioner devotes (Pet. 12-13) two paragraphs to arguing the merits of the case. The response deserves even less space.

The short answer, as the Sixth Circuit recognized, is that the relevant issues related to whether a court should take the extraordinary step of dismissing a case for failure to join a critical party have more in common with the traditional work of appellate judges than the traditional work of trial judges. By their terms, the Rule 19(b) questions demand legal, not factual, answers. Will for example the "plaintiff have an adequate remedy if the action is dismissed for nonjoinder"? *See* Rule 19(b). Or will a "judgment rendered in the person's absence . . . be adequate"? *Id.* Both inquiries require legal, not factual, assessments of the available remedies at law to an interested party. And while the two other Rule 19(b) questions have a factual ring to them—will a judgment "prejudice" the absent party and may that prejudice "be lessened or avoided"?—the inquiry in each instance is in the end again a legal one. Any potential prejudice to a potential party stems not from run-of-the-mill factual inquiries about the parties but from the legal effect a judgment entered in one case will have on a potential dispute in another case.

V. This Case Presents A Poor Vehicle For Reviewing The Issue.

But even if all of this were not true—in other words, even if there were a material conflict of authority or even if the Sixth Circuit had decided the question incorrectly—this case presents a weak vehicle for considering the issue. For one, petitioner did not even raise (or preserve) the standard-of-review issue in his merits briefs to the Sixth Circuit. Not until petitioner's rehearing and *en banc* petition did he first raise the

question. That is why the Sixth Circuit did not analyze the question in any detail and that is why the issue presumably has been waived here.

For another, this case arises in the unique setting of the enforceability of an arbitration agreement under the Federal Arbitration Act. In view of the long-established position that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration," *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983), it would seem to make little sense to issue a decision about the Rule 19(b) standard of review when that determination here could well be affected by the federal courts' presumption in favor of arbitration. Confirming the point, not one of the lower-court cases upon which petitioner relies involves the enforcement of an arbitration agreement. And in point of fact, the federal appellate courts that have considered the specific Rule 19 question presented below—whether an employee is an indispensable party to a federal arbitration petition filed by his or her employer—have uniformly rejected that notion, just as the Sixth Circuit did. *See Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 445 (2d Cir. 1995); *Snap-On Tools Corp. v. Mason*, 18 F.3d 1261, 1267 (5th Cir. 1994); *NCR Corp. v. Hayes Children Leasing Co.*, No. 94-16996, 1995 WL 433916, at *4 n.1 (9th Cir. July 24, 1995); *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 946 (11th Cir. 1999).

For still another reason, this case hardly presents an efficient setting for reviewing the issue. As noted, the Rule 19(a) standard of review, which petitioner also claims is in disarray, is not properly presented in this case since petitioner prevailed on the issue below. In addition, the standard-of-review question would almost certainly arise in other cases asking substantive questions about how Rule 19 should be interpreted substantively. Better, it would seem, to review the question either when the Court is asked to resolve a conflict about the meaning of the Rule itself or when at a minimum it

is legitimately called upon to announce the standard of review for Rule 19(a) and Rule 19(b) determinations.

For a final reason, this case does not stand alone. As noted, there is a parallel state-court proceeding in which respondents have argued that the underlying arbitration agreement must be enforced. Thus far, the state courts have rejected that contention. On August 13, 2002, however, respondent filed a petition for a writ of certiorari with this Court regarding that state-court determination. In view of the pendency of that petition, involving essentially the same parties and concerning the same arbitration agreement, it would be a mistake to grant this petition before the Court determines the proper resolution of the state-court certiorari petition. A final resolution of the state-court proceeding could well affect the ongoing relevance of this federal-court action.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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No. 01-1665

In the Supreme Court of the United States

ALFRED M. COHEN, EXECUTOR OF THE ESTATE OF SAMUEL GINSBURG,
Petitioner,

v.

PAINEWEBBER, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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STATEMENT PURSUANT TO RULE 29.6

Petitioners' Rule 29.6 was set forth at page ii of the Petition for Writ of Certiorari, and there are no amendments to that statement.

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ARGUMENT

I. This Court recognizes Rule 19(b) is a factual determination

Admittedly, this Court has not expressly stated whether Rule 19(b) is subject to an abuse of discretion review or de novo review.[1] However, an earlier opinion of this Court discussing Rule 19(b) clearly recognizes that a Rule 19(b) determination is subject to an abuse of discretion standard of review. In *Provident Trademens Bank & Trust Co. v. Patterson,* this Court stated, "[t]he decision whether to dismiss (i.e., the decision whether the person is indispensable') must be based on factors varying with different cases..."390 U.S. 102, 119, 88 S.Ct. 733, 743, 19 L.Ed.2d 936 (1968) Furthermore, this Court stated "[w]hether a person is 'indispensable' that is, whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of particular litigation." 390 U.S. 102, 118. Appellate courts have read this Court's opinion to require Courts of Appeal to apply an abuse of discretion review when considering Rule 19(b). The First Circuit, for example, in *The Travelers Indemnity Company v. Dingwell,* 884 F.3d 629 (1st Cir. 1989), interpreted *Provident* to require an abuse of discretion review.

> We favor the position of the District of Columbia and Ninth Circuits. Rule 19(b) determinations must be based on fact-specific considerations. See Provident Tradesmens

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[1] The lack of a determination by this Court establishing the standard of review is the very reason the Petitioner seeks a writ of certiorari.

> Bank & Trust Co. v. Patterson, 390 U.S. 102, 119, 88 S.Ct. 733, 743, 19 L.Ed.2d 936 (1968).....[I]nstead, they involve the balancing of competing interests and must be steeped in "pragmatic considerations." *Id.* The district court, which is "closer to the arena," is in the preferred position to make these decisions. See Broussard v. Columbia Gulf Transmission Co., 398 F.2d 885, 889 (5th Cir.1968). We hold that its Rule 19(b) conclusions are entitled to deference, and will not be reversed unless they amount to an abuse of discretion.

The Travelers Indemnity Company v. Dingwell, 884 F.3d 629, 635 (1st Cir. 1989).

The reasonable conclusion to draw from *Provident* is that a Rule 19(b) determination is fact specific and subject to an abuse of discretion standard of review. The Respondent chooses to ignore this reality. Additionally, the Respondent further chooses to ignore the First Circuit's interpretation and application of *Provident* in *Travelers*. As evidenced by the decisions cited in the Petition for writ of Certiorari, many federal appellate courts review Rule 19(b) determinations de novo instead of applying an abuse of discretion standard. These appellate courts are wrong and require the guidance that only this Court can provide.

II. The Respondents confirm a meaningful conflict exists among the circuits.

The Respondent, in its brief, confirms that a conflict exists among the circuits. For instance, the Respondent admits that "[a]s to the Fourth Circuit, the cited case does

purport to apply an abuse of discretion standard to a Rule 19(b) determination." (Brief in Oppos. 7) This standard, moreover, is in direct conflict with the Sixth Circuits' de novo standard of review. *Keweenaw Bay Indian Community v. Michigan*, 11 F 3d 1341, 1346 (6th Cir. 1993). The statement by the Respondent is a single example of conflict among the circuits. In addition, the Respondent fails to dispute that the Third Circuit applies a standard of review that is different than the standard applied by the other Circuits. The Third Circuit reviews 19(a) determinations de novo and applies an abuse of discretion standard to 19(b) determinations. *Koopers Company, Incorporated v. The Aetna Casulty and Surety Company*, 158 F.3d 170 (3rd Cir. 1998.) Finally, the Fourth Circuit recognizes the disparity of standards of review among the circuits. Footnote 7, in *National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Rite Aid of South Carolina, Incorporated* states,

> **The circuits vary greatly in the standard of review to apply to a district court's Rule 19 determination**. The Ninth and Tenth Circuits apply an abuse of discretion standard to the district court's determination under both 19(a) and 19(b).... [T]he Sixth Circuit applies an abuse of discretion standard to the district court's analysis under 19(a) and a de novo standard to its analysis under 19(b). ...[T]he First, Second, Third, Fifth, Eighth, Eleventh, and D.C. Circuits do not appear to have decided on a standard for a district court's determination under 19(a) and apply an abuse of discretion standard to its determination under 19(b)....[T]he Seventh Circuit has expressly declined to adopt a standard of review at all. (emphasis added)

National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Rite Aid of South Carolina, Incorporated, 210 F.3d 246, 250 f.n. 7 (4th Cir. 2000).

The Respondent does not respond to the circuit court conflict. Instead, the Respondent selectively discusses the merits of a few of the cases cited by the Petitioner, and expresses the Respondent's misguided perception that the standard of review is immaterial and that the circuit courts are prone to apply a different standard than the standard stated in written opinions. *See* Brief in Oppos. 7 (4th and 6th Circuits are claiming to apply one standard but actually apply a different standard). The Respondent's skepticism regarding the ability of circuit courts to understand and apply the different standards of review is troublesome. It, however, underscores the point of the Petitioner that confusion exists regarding the appropriate standard and that this Court should provide the necessary guidance. By arguing the merits of selected cases, the Respondent only distracts this Court from focusing on the undisputed circuit court conflict that exists.

III. The conflict between the circuits is sufficient to warrant a review by this Court.

A decision by this Court is important not only for the underlying action but for all cases involving Rule 19 determinations. This Court's decision directly will influence the outcome of the present case. In the Sixth Circuit's decision, the court recognized that a finding that the Respondent was an indispensable party was reasonable because it concluded that the Petitioner would suffer prejudice and piecemeal litigation without joinder. *Op. at 12.*

The Sixth Circuit only could reverse the trial court by applying a de novo review. A de novo review permitted the Sixth Circuit to substitute its judgment concerning the interpretation and application of the facts for the interpretation and application of the facts made by the trial court. If the Sixth Circuit had applied an abuse of discretion review, it could not have substituted its judgment for the judgment of the trial court, and it would have affirmed the trial court's finding that the Respondent was a necessary party.

This Court's acceptance and decision regarding the appropriate standard of review is important to resolving future Rule 19 litigation. Appellate practice and procedure relies heavily on the correct standard of review. Without a predetermined standard of review it is difficult for attorneys and judges to determine whether a case has merit regarding an appeal.

IV. The Sixth Circuit's Decision is Incorrect On The Merits.

As stated in the Petition for Writ of Certiorari, Rule 19 involves a factual determination. The four factors outlined in Federal Rule of Civil Procedure 19(b) require fact-finding. The first factor requires the district court to determine the prejudice to the parties. The only means that a district court has to assess prejudice is to review the facts surrounding each of the parties. The second factor requires the district court to determine if the prejudice can be lessened. Again, this requires the district court to assess the unique circumstances of each of the parties. The third factor requires an assessment concerning whether a judgment rendered in a party's absence would be adequate. The district court only can obtain this finding by analyzing the relationship of the parties. The district court only can determine this relationship by

examining the facts. The fourth factor involves the availability of an adequate remedy if the district court dismisses the case. This finding obviously involves a factual determination of the available remedies. *See e.g.*, Op. at 13 (panel decision finding that state court provides an alternative forum).

V. The Federal Arbitration Act is not an Issue for Consideration.

The Petitioners always have recognized the importance of the Federal Arbitration Act. However, the present question for review does not involve the Federal Arbitration Act. The only question for review is what is the appropriate standard of review for Rule 19. The Respondent, none the less, continues to raise the Federal Arbitration Act. This topic only serves to confuse and distract from the main issue of the appropriate standard of review. Indeed the Respondent is unable to find any case or authority to support its apparent position that the Federal Arbitration Act supercedes the Federal Rules of Civil Procedure.

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.